IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.718 OF 2016

Sunil s/o Fattesing Sable
Age: 25 years, Occu.: Business,
R/o. Wadli, Hanumanfali (Area),
Tq. Nizar, Dist. Tapi,
(Gujarat State) .. Appellant

Versus

The State of Maharashtra
Through P.S.O.
Pimpalner Police Station, Tq. Sakri,
Dist. Dhule. .. Respondent

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Mr. Pradeep K. Palve, Advocate for the appellant (Appointed through Legal Aid).
Mr. A. M. Phule, APP for the respondent – State.

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CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.
RESERVED ON : 28th August, 2023
PRONOUNCED ON : 3rd October, 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 POCSO Act, Dhule in Special (POCSO) Case No.40 of 2015 dated 25.10.2016 after holding him guilty of committing offence punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (for short "POCSO Act"), under

Section 376 (1)(2)(i), 341, 506 of Indian Penal Code.

2. Prosecution has come with the case that P.W.5 is the father of victim. Victim was aged 14 years on 24.08.2015 and had taken education up to 7th standard. Thereafter, she has left the schooling from the said year. On 22.08.2015, victim had gone to Wanjartanda for religious ceremony at the place of sister-in-law of the informant. Around 3.00 a.m. on 24.08.2015, informant received phone call from his nephew (brother's son) informing him that he should immediately come to Konkangaon. Though informant asked him the reason for which he has called, the nephew did not disclose. Immediately he went to Konkangaon on motorcycle. After reaching the said place, his nephew told that around 8.00 a.m. in the morning i.e. the earlier day, the victim had gone for answering nature's call out of the house. When she returned, he found that she has sustained injury near her eyes, hands and back. At that time, he asked her as to what had happened, but she has not disclosed anything. She was found frightened and, therefore, the informant was called. Informant had also tried to make his daughter comfortable and asked about the incident, but she was not ready. Therefore, informant took the victim along with him and came to his house. In the house informant's wife/victim's mother asked her as to what has happened, then the victim informed that when she had gone for answering nature's call, around 8.00 a.m., accused who had came to stay

with his maternal aunt, whose house was behind the house of sister-in-law of the informant, obstructed her way, took her to field and after undressing her, had forcible sexual intercourse. When she resisted, she was assaulted by the accused and threatened that if she discloses the incident to anybody she would be killed and, therefore, she had not disclosed the incident to anybody. After informant's wife disclosed the narration of the victim to the informant; informant and victim went to police station and lodged the FIR.

3. On the basis of the said FIR offence vide Crime No.62 of 2015 was registered. The victim was sent for medical examination. Panchanama of the spot was got executed. Statements of the witnesses were recorded. Accused came to be arrested. He was also got medically examined. The clothes of the victim as well as accused came to be seized and along with the other seized muddemal, those articles were sent for chemical analysis. After the completion of investigation, charge-sheet was filed.

4. After the charge-sheet was produced, the learned Special Judge took cognizance of the offence and framed charge at Exhibit-03. When the accused pleaded not guilty, prosecution has examined in all eight witnesses to bring home the guilt of the accused. Taking into consideration the evidence on record and hearing both sides, the learned Trial Judge has held the accused guilty and he has been sentenced to suffer imprisonment for life and to pay fine of Rs.10,000/- in default to undergo rigorous

imprisonment for three months for the offence punishable under Section 4 of the POCSO Act. The accused has been further directed to undergo rigorous imprisonment for twelve years and to pay fine of Rs.10,000/- in default to suffer rigorous imprisonment for three months for the offence punishable under Section 376(1)(2)(i) of the Indian Penal Code. The accused has been further sentenced to undergo rigorous imprisonment for one month and pay fine of Rs.500/- in default to suffer rigorous imprisonment for 10 days for the offence punishable under Section 341 of Indian Penal Code. Further, the accused has been sentenced to undergo rigorous imprisonment for two years and to pay fine of Rs.2000/- in default to undergo rigorous imprisonment for 15 days for the offence punishable under Section 506 of Indian Penal Code. All the sentences have been directed to run concurrently. This is the conviction which is challenged before this Court.

5. Heard learned Advocate Mr. Pradeep K. Palve for the appellant and learned APP Mr. A. M. Phule for the respondent – State and perused the entire record.

6. It has been vehemently submitted on behalf of the appellant that the learned Trial Judge has not appreciated the evidence properly. There was delay in lodging the report which has not been considered. It is alleged that the incident had taken place on 23.08.2015, yet the nephew of the

informant had given him phone call around 3.00 a.m. in the intervening night of 23.08.2015 to 24.08.2015. The FIR came to be registered around 10.00 a.m. on 24.08.2015. The said delay in lodging the FIR has not been considered. Further, even as per the FIR, the informant had gone to Kokangaon where it is alleged that the victim was present in the house of the brother of the informant. It is hard to believe that though there was disclosure about the incident to the nephew immediately after the informant returned, then why the nephew will take time up to 3.00 a.m. to inform the incident to the father of the victim. When the delay has not been explained, the benefit of the same should go to the accused.

It has been further submitted that in her statement under Section 164 of the Code of Criminal Procedure, the victim has not stated name of a person, who has done such kind of act with her, rather in the said statement she has stated that the boy was unknown and from a different village. No Test Identification Parade was conducted. How informant could get the name of the accused prior to lodging of the FIR is a mystery, which the prosecution failed to solve. P.W.1 recognized the accused before the Court for the first time and, therefore, the benefit ought to have been given to the accused. The mother of the victim to whom alleged disclosure was made and also the cousin brother to whom the disclosure was made have not been examined by the prosecution for the reasons best known to it and,

therefore, there was no clinching evidence against the appellant. He ought to have been released on bail. It has been also pointed out by the learned Advocate for the appellant that taking into consideration the conviction awarded and the duration, it can be said that the accused has entirely undergone the sentence. He, therefore, prayed for setting aside the impugned order and acquittal of the accused.

7. In order to refute the points raised by the learned Advocate for the appellant, learned APP submitted that the age of the victim has been proved by leading cogent evidence. The headmaster of the school, where the victim had taken education, has been examined to prove that on the date of incident, the victim was below 14 years of age. There was absolutely no delay in lodging the FIR. It appears that the accused was unknown to the victim, though it appears that she could point out where he stays and thereupon his identity was established and was told by the nephew of the informant to the informant. Unless the identity was established, the FIR could not have been adequately lodged. The victim's testimony stood supported by medical evidence and the spot panchanama. The medical officer had found that the girl was subjected to rape and she had sustained injuries on her body. The spot panchanama shows that the place was trodden, therefore, the ocular evidence i.e. the testimony of victim, which is on the highest footing, is also supported by medical

evidence as well as the spot panchanama. Therefore, the conclusion drawn by the learned Trial Judge and the conviction awarded does not require any interference.

8. We would like to scan the evidence of P.W.1 victim first and if her evidence is trustworthy, then it can be certainly said that the trial Court was justified in convicting the accused. P.W.1 was aged 14 years and the learned Trial Judge had taken precautions to see whether she was able to understand the questions those would be put to her. When it was found that she had sufficient knowledge, then her testimony has been recorded by administering oath. She has given her birth date as 25.05.2001. It was corroborating to the school leaving certificate of the school where she has taken education. She has stated that her aunt stays at Kokangaon and the cousin sister is also residing there and the said village is also called as Vanzar-Tanda. She has thereafter stated that around 8.00 a.m. on 23.08.2015, when she had gone in the agricultural land for attending nature's call, the accused came (she has used the word 'he'), made her to lie on the ground and removed her clothes. When she tried to raise shouts, he gagged her mouth. In the said attempt she has sustained injury to her eye and then the accused has raped her. After wearing clothes, somehow she went to the house and as she was threatened to kill, she had not disclosed the fact to anybody. But then her brother gave a phone call to her

father and father came around 3.00 a.m. on 24.08.2015. She was consistent in saying that she had not told anything to her father also. But according to her, father understood what had happened with her after noticing her face and then took her to police station. It is to be noted that the girl had not stated that she was taken to house first and she had narrated the incident to mother. The said fact is not that significant as it is only the narration of the incident to the mother. She has identified the accused being the same person.

9. The identification of the accused is the important point raised on behalf of the accused, however, only a stray suggestion or question was asked in the cross-examination. It was not tried to be elaborated and it was not extracted as to whether she had seen the accused prior to the incident or not. She was certain in saying that the boy was from out of village and she is unable to tell his name and after the incident he ran away. Only on the basis of this statement, we cannot come to the conclusion that the identification of the accused by the victim is false or inadmissible. A witness may not be knowing name of the accused, but thereafter with the description or some other particulars like relative of somebody to whom the witness is knowing or would have seen residing in a particular place are the criterias with which the identity can be established. Here, no questions were asked on that point, but the fact is that the incident is alleged to have

taken place at 8.00 a.m. i.e. the broad daylight and she had sufficient time to recognize the accused. Rather it has been extracted in her cross-examination that she had stated about the incident to her brother after returning home and after her parents reached there, they went to the police station on the same day. That means what has been left out in the examination-in-chief has been extracted in the cross-examination. Therefore, we do not find any fault as regards the identification of the accused. Her identification before the Court i.e. in the substantial evidence carries importance. No doubt, in her statement under Section 164 of the Code of Criminal Procedure, she has not stated the name of the accused, but at that time, the accused was not before the girl and, therefore, the identification is important, rather than the name.

10. In her cross-examination, the so called improvements have been brought on record, but they are insignificant. She has rather given explanation as to why certain facts were not told by her even to the police, as she says that she was ashamed to tell those facts. We can understand that she was aged 14 years at that time and would have felt embarrassed to tell some facts. It is rather the failure on the part of the investigating officer to get the proper statement of such victim. In such cases, the investigating officer should make the girls comfortable and then try to take the statements. If we consider the evidence of P.W.8 PSI Daulat Jadhav, then he

is a male person. Though he is more than the age of the informant i.e. fatherly figure, still he was a stranger for her and, therefore, she could not have given the specific details. It is the duty of the investigating officer as well as the presiding officers, whoever is recording the statement of the victims of sexual assault or harassment, to make the victims comfortable and then only record their statements.

11. P.W.1 the victim has categorically stated the act which was done by the accused with her. She has also stated that she had sustained injury at the said time and it will not be out of place to mention here that the said fact stood corroborated in the testimony of P.W.7 Dr. Bhavna Kankariya, who had examined her on 24.08.2015. Here, it is to be noted that the medical examination of the girl had started around 11.08 a.m. on 24.08.2015. Much has been stated about the delay in lodging the FIR. No doubt, the incident is stated to have occurred around 8.00 a.m. on 23.08.2015, but the victim has not stated when exactly she had disclosed the said fact to her cousin brother. In her examination-in-chief, she says that her brother gave a phone call to her father at 3.00 a.m. on 24.08.2015 and immediately father came. In her cross-examination, there was no attempt as to exactly when she disclosed the said fact to brother or why she had not disclosed it prior to 3.00 a.m. on 24.08.2015. It is the intervening night of 23.08.2015 to 24.08.2015 when the disclosure was made and then

the brother had given phone call. Even father has said that the girl was in frightened condition and, therefore, we cannot say that there is any delay in lodging the FIR. It appears that the girl could be made comfortable only after the arrival of her mother, which is but natural.

12. Perusal of the examination-in-chief of P.W.1 the victim would show that there was absolutely no enmity between her and the accused so that she could think of implicating him. It was not even suggested that she has taken the name of the accused at the behest of her cousin brother. If we consider the statement of the accused under Section 313 of the Code of Criminal Procedure, he has stated that there was quarrel between him and cousin brother of the victim in a marriage. This answer was given to the question as to why the prosecution witnesses were deposing against him. But he has given answer in the negative to the question, as to whether he want to say anything more? When that marriage has taken place, what was the reason for the quarrel has not been stated by him. A suggestion to this fact was also given to the investigating officer P.W.8 PSI Jadhav, however, without giving any details, we cannot appreciate the defence. There has to be a proximity between the two incidents, especially to the extent of implicating someone on the allegations of rape. Therefore, there was no reason to disbelieve the testimony of the victim.

13. Testimony of P.W.7 Dr. Kankariya would show that the history was given by the victim to her and the history that was taken down on Exhibit-31 corroborates the FIR and the testimony of the victim. However, in her cross-examination, she has admitted that there was no tear on the hymen and there was no bleeding. No semen was detected on vagina cervical swab puriphere and vaginal smear as per C.A. report. No doubt, she has also stated that, that is why she could not give the final opinion, but in her examination-in-chief, she has specifically opined that evidence of sexual assault on the victim cannot be ruled out. In the examination-in-chief itself, she has given explanation that as per the C.A. reports, it can be seen that there was assault on the victim, but she was unable to say that there was sexual intercourse committed with the victim. She has also stated that it is not necessary in every victims that the hymen is to be ruptured. It depends upon the act and the force with which the act is done and, therefore, she says that in such case there may not be any injury on the libia majora and libia minora. Therefore, taking into consideration the entire evidence, it was the case of aggravated penetrative sexual assault/rape. Even if for the sake of arguments we take that the medical evidence is not supporting the prosecution, still we will have to apply the rule that in case of variance between the ocular and the medical evidence, the ocular evidence would prevail and as aforesaid, the evidence of the victim is consistent. P.W.2 Dr. Kapileshwar Chaudhari is the medical officer,

who had examined the accused and he had come to the conclusion that the accused was able to perform sexual intercourse.

14. P.W.5 is the father of the victim, who has proved the FIR Exhibit-23. From his cross-examination also, it can be seen that there was no reason for him to implicate the accused. He has denied the suggestion that name of the accused was given by the nephew, but according to him, the name of the accused was given by his son. There is no further question as to how the son was knowing the name of the accused and, therefore, such halfhearted questions would not prove the defence.

15. The next important evidence is of P.W.6 Lala More, the headmaster of the school where the victim was taking education. He has stated that as per the school record, the birth date of the victim is 25.05.2001. Therefore, on the date of incident, the victim was minor, however, it appears that at the time of admission of the girl, she had taken admission in 5th standard and there was no supporting record of the earlier school. In his examination-in-chief he has stated that at the time of admission, her school leaving certificate of primary school was taken by them and on the basis of that the entry was taken in general register. He had brought the original and produced the true copy. In the cross-examination, it has been harped that the birth certificate of the victim was not perused by the school authorities when the admission was given in 5th standard to the victim. Reliance can be

placed on the decision in **P. Yuvaprakash Vs. State represented by Inspector of Police, [Criminal Appeal No.1898 of 2023]** decided by the Hon'ble Supreme Court on 18.07.2023, wherein it has been observed that :-

> "It is evident from conjoint reading of the above provisions that wherever the dispute with respect to the age of a person arises in the context of her or him being a victim under the POCSO Act, the courts have to take recourse to the steps indicated in Section 94 of the JJ Act. The three documents in order of which the Juvenile Justice Act requires consideration is that the concerned court has to determine the age by considering the following documents:
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> "(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;
>
> (ii) the birth certificate given by a corporation or a municipal authority or a panchayat;
>
> (iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board"

16. In the above said authority, reliance was placed on Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 and the three documents mentioned therein would become important for determination

of age even for the victim. Here, there is no birth certificate from the school. It is the school leaving certificate wherein birth date is mentioned, but it is not the first school in which the admission was taken. There was no ossification test conducted in this case, however, this question would come when the girl is on the border line. When there is still margin of four years, it cannot be said that the girl was not a "child" as defined under Section 2(d) of the POCSO Act. The father of the victim who has the knowledge of the date of birth of the daughter, his testimony would be also important in that respect and, therefore, in this case the prosecution had proved that the victim was a child.

17. The other witnesses, who have been examined by the prosecution, are the panchas to the spot panchanama, seizure panchanama and the investigating officer. Taking into consideration the testimony of all the witnesses, we are of the opinion that the prosecution had proved that the accused was the person who had ravished the victim, who was minor and there is absolutely no perversity in the conclusion arrived at by the learned Trial Judge. There is no merit in the present appeal. It deserves to be dismissed. Accordingly, the appeal stands dismissed.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

scm