

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

CRIMINAL APPEAL NO. 655 OF 2019

APPELLANT : Sunil @ Sumit S/o Pralhad Ramteke,
Aged about 28 years, Occu. Labourer,
R/o Fegad, Kuhi, Dist. Nagpur.
(Presently at Central Prison, Nagpur)

VERSUS

RESPONDENT : State of Maharashtra,
through Police Station Officer,
Police Station, Weltur, Dist. Nagpur.

Mr. Amit S. Band, Advocate for the appellant.
Mr. M. J. Khan, A. P. P. for the respondent /State

CORAM : V. M. DESHPANDE, J.

DATE : JANUARY 21, 2020.

ORAL JUDGMENT

1. This appeal is filed by the appellant, who is in jail, through his Advocate Mr. Amit S. Band. The appellant along with co-accused Rohit @ Golu were convicted by the learned Extra Joint Additional Sessions Judge, Nagpur in Special Child Protection Case No. 246/2017 by its judgment and order dated 25.03.2019.

2. The appellant/accused no.1 was convicted for the offence punishable under section 376(2)(i)(j) read with Section 109

of the Indian Penal Code and under Sections 16 and 17 read with Sections 3 and 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as “the POCSO Act” for the sake of brevity) and he was sentenced to suffer rigorous imprisonment for Ten years and to pay a fine of Rs.2,000/-, however no separate sentence was imposed on him for his conviction under Sections 16 and 17 read with Sections 3 and 4 of the POCSO Act. He was also convicted for the offence punishable under Sections 354 and 354A of the Indian Penal Code and was directed to suffer rigorous imprisonment for one year and to pay a fine of Rs.500/-. He was also convicted for the offence punishable under Section 342 of the Indian Penal Code and was directed to suffer rigorous imprisonment for six months and to pay a fine of Rs.500/-. All the sentences were directed to run concurrently.

Accused no.2 Rohit @ Golu was convicted for the offence punishable under Section 376(2)(i)(j) of the Indian Penal Code read with under Sections 3 and 4 of the POCSO Act and directed to suffer rigorous imprisonment for Ten years and to pay a fine of Rs.2,000/-. He was also convicted for the offence punishable under Section 506 of the Indian Penal Code and directed to suffer rigorous imprisonment for six months and to pay a fine of Rs.500/-. He was also convicted for the offence punishable under Section 342

of the Indian Penal Code and was directed to suffer rigorous imprisonment for six months and to pay a fine of Rs.500/-. It is informed to this Court that the said co-accused chose not to file any appeal before this Court.

3. In view of the aforesaid, this Court is required to assess the prosecution case qua the appellant only, who was accused no.1 in Special Child Protection Case No. 246/2017.

4. The prosecution case as it was disclosed during the course of trial, can be narrated as under :-

A] Smt. Swati Lokhande, a Woman Police Naik, was attached to Weltur Police Station on 10.8.2017 and when she was discharging her duties on the said day, at 11.30 am, the victim along with her grandmother came to police station. The victim gave her oral report. It is at Exh.19. After recording the said report as per the victim's version, the said was signed by the victim herself. Subsequently, on the basis of said report, the offence was registered with the said police station vide Crime No. 79/2017. The printed first information report is at Exh.86. Smt. Swati Lokhande also recorded the statement of some witnesses after registration of the crime.

B] As per the report (Exh.19), the victim is aged about 13 years and she was taking her education in 8th standard at Bhartiya Dnyanpeeth School at village Fegad. She is having one elder sister and two brothers. Her parents are the labourers. As per the report, on 05.8.2017, she along with her friend Anjali at 5.00 O'clock in the evening were proceeding to their friend Harsha for obtaining homework note book. That time, Sumit Ramteke (appellant) called her. Anjali proceeded further. At that time, the appellant caught hold the victim and took her to the house of Golu Barsagade (co-accused). Thereafter, she was pushed by the appellant inside the house of Golu and from outside he latched the room. That time co-accused Golu was present in the house. As per the first information report, from the outside appellant stated “गोलु ला जमवु दे, तूला किती पैसे पाहीजे ते मी देतो”. Thereafter, as per the first information report, co-accused Golu removed the clothes of the victim and committed rape on her. In the meanwhile, her sister Kajal was brought by Anjali and she took out the victim from the house of co-accused. As per the report, since there was a threat given by Golu that she (victim) will be defamed in the society, she and her sister Kajal did not disclose the incident immediately. However, on 09.8.2017 pain started to the victim and therefore, she disclosed the incident to her grand-mother and thereafter they reached to the

police station and lodged the report.

C] After registration of the crime, its investigation was entrusted to API Avinash Upase (PW9). He took panchas with him and went to the spot and prepared the spot panchanama (Exh.27), which was duly signed by him and two panchas. He also sent the victim to Primary Health Centre, Weltur by giving requisition letter to the Medical Officer (Exh.73). From there, the victim was referred to Mayo Hospital, Nagpur. Therefore, the Investigating Officer gave requisition letter to the Medical Officer, Mayo Hospital Nagpur (Exh.57). The victim was examined there by the Medical Officer. API Upase then arrested the accused persons. He also collected the Birth Certificate of the victim issued by the Gram Panchayat in pursuance to the requisition letter given by him to the Gram Panchayat to provide the Birth Certificate. The said letter is at Exh.75. The Birth Certificate of the victim is at Exh.76. The Investigating Officer also recorded the statement of the victim through CWC and also through the Magistrate.

D] The Investigating Officer also seized a quilt from the spot while preparing the spot panchanama. Said quilt was seized under seizure panchanama (Exh.28). He also seized clothes of the

victim vide seizure panchanama (Exh.29) and the medical samples of the victim were seized under seizure panchanama (Exh.30). Similarly, the clothes of the appellant were seized under seizure panchanama (Exh.32), while the clothes of co-accused Golu were seized under seizure panchanama (Exh.31). After completion of usual investigation, he filed the charge-sheet.

E] The learned Extra Joint Additional Sessions Judge, in Special Child Protection Case No. 246/2017 framed the Charge against the appellant and co-accused Rohit @ Golu. The learned Judge Charged the appellant for the offences punishable under Sections 354, 354A, 506 and 109 read with Section 376(2)(i)(j) of the Indian Penal Code and under Section 16 read with Section 3, 4 of the POCSO Act, whereas he charged co-accused Rohit @ Golu for the offence punishable under Sections 376(2)(i)(j), 506 and 342 read with Section 34 of the Indian Penal Code and under Sections 3 and 4 of the POCSO Act. Both the accused denied the Charge and claimed for their trial. In order to prove its case, the prosecution has examined in all ten witnesses and also relied upon various documents duly proved during the course of the trial. Statement of both the accused under Section 313 of the Code of Criminal Procedure were recorded by the learned Judge. Co-accused Rohit @

Golu also examined two defence witnesses. The appellant did not examine any defence witness. His defence was of total denial. Defence of the co-accused was that the day of the incident was Rakhi Pournima and therefore, his sisters were present in the house and he was not alone at home. The learned Judge found that the prosecution has proved its case against both the accused and at the same time found that co-accused could not prove his defence. The learned Judge also found that there was no occasion or reason for the victim girl to falsely implicate the appellant and therefore, passed the impugned judgment.

5. According to the learned counsel for the appellant Mr. A.S. Band, the appellant is falsely implicated in the crime. He submits that there is delay in lodging the first information report. It is also his submission that if the entire case of the prosecution is evaluated in its correct perspective, it appears that the victim girl was a consenting party and therefore, the Court below ought not to have convicted the accused.

6. Per contra, Mr. Khan, the learned Additional Public Prosecutor for the State vehemently submitted his brief for dismissal of this appeal.

7. The prosecution has examined in all ten witnesses they are as under :-

- i] PW1 the victim.
- ii] PW2 Shrikrushna Titarmare. He acted as a panch and proved spot cum seizure panchanama (Exh.28) and various seizure panchanamas i.e. Exhs.29 to 32.
- iii] PW3 Tejram Ghadwe. He also acted as panch along with PW2 Shrikrushna Titarmare.
- iv] PW4 is Smt. Kantabai, grand mother of the victim, to whom the incident was disclosed by the victim and thereafter, she accompanied the victim to the police station.
- v] PW5 is Kajal. She is sister of the victim, who rescued the victim from the house of co-accused.
- vi] PW6 is Anjali Bagade. She is friend of the victim. She turned hostile.
- vii] PW7 is Dr. Priyanka Shelkar, who examined the victim.
- viii] PW8 is Lata. She is the mother of the victim.
- ix] PW9 is ASI Avinash Upase, the Investigating Officer and
- x] PW10 is Swati Lokhande, who has taken down the oral report.

8. During course of the investigation, PW9 ASI Upase gave a requisition to the Gram Panchayat, Fegad to furnish the birth certificate of the victim. Accordingly, Secretary of the Gram

Panchayat issued birth certificate of the victim. The said is at Exh.76. It shows that date of birth of the victim is 04.9.2004. Even in the examination-in-chief itself, the victim did disclose her date of birth as 04.9.2004. The said version of the victim was not at all challenged by any of the accused. Further, before this Court, the learned counsel for the appellant did not dispute the date of birth of the victim as 04.9.2004. Thus, it is crystal clear that on the date of the incident the age of the victim was about 13 years and as such she was a “Child” within the meaning of Clause (d) of Section 2(1) of the POCSO Act.

9. As per the report, the victim belong to a backward class and was taking education in 8th standard. She in her evidence as well as in the first information report stated that she along with PW6 Anjali were proceeding to the house of one Harsha for collecting homework note book. PW6 Anjali did not support the prosecution, however, support the version of the victim that she is her friend and Harsha is also their friend.

10. As per the evidence when the victim along with Anjali (PW6) were proceeding to the house of Harsha, on the way the appellant intercepted the victim and caught hold her and pushed her

inside the house of co-accused Golu and latched the door from outside. As per the first information report as well as her substantive evidence, when the victim shouted that time the appellant stated and uttered words from outside “*त्याला जमवु दे, तूला लागेल तितके पैसे मी देइल.*” In this part of the country, when words are made to read “*जमवु दे*” that means that the person uttering such words demands sexual pleasure from such girl or woman. The incident has occurred in village Fegad. Therefore, it is quite possible that the appellant, who is resident of such village, would use such rustic language. Therefore, after pushing the victim inside the house of co-accused Golu when the appellant said from outside “*त्याला जमवु दे*”, it means that he was asking the victim girl that she should allow Golu to have sex with her. Not only that, as per the victim’s evidence, the appellant further states that he will pay the amount to her as per her wish.

11. According to the learned counsel Mr. Band, independent witness Anjali has turned hostile. It is also his submission that the appellant has not committed rape on her. True it is that Anjali did not support the prosecution. However, if her evidence is scanned properly, it is crystal clear as to for what reason she is not supporting the prosecution case. Paragraph 4 of the evidence of Anjali when

she was cross-examined by the learned Additional Public Prosecutor is very important in that behalf and the same is reproduced herein below :-

“4] It is true that, our’s is a small village and therefore we know every person. It is true that, the family members of the accused are playing black magic. It is true that, all the villagers are aware of this fact. It is true that as such the villagers have apprehension in their minds for them. It is true that, as such people are not talking against them. It is true that, due to such apprehension I am also not interested to involve in this matter. It is true that, the incident happened with xxx (victim) is known to may villagers. It is true that, I also know the incident occurred with xxx (victim). It is true that, as we have to stay in the village and due to apprehension I am not deposing against them.”

From the aforesaid, it is clear as to what must have been the reason in the mind of this prosecution witness, who was also aged about only 14 years, for not supporting the prosecution case. However, her evidence as appearing in paragraph 4 clearly proves that the incident had occurred to the victim, but due to fear for the reasons stated, she was not courageous to state in examination-in-chief. Though, in the examination-in-chief, she could not gather courage, however it appears from her cross-examination that anyhow she gathered courage and truth has come on record. In that view of the matter, though formally Anjali (PW6) was declared hostile, she is witness to

the truth and she supported the prosecution when she narrated that the incident had occurred to the victim.

12. As per the evidence of PW5 Kajal, Anjali (PW6) had been to her house and narrated that victim was shouting from the house of Golu. Therefore, PW5 Kajal went near the said house. As per the evidence, that time the appellant was standing outside the house of the co-accused and the house was closed from outside. When she tried to enter, the appellant obstructed her from entering in the house. However, she gave jerk to the appellant and entered inside the house. That time co-accused Golu was committing rape on her minor sister. When she was taking out her sister, as per the evidence of Kajal, both the accused extended threat to kill her parents and defame both of them.

13. True it is, there is delay in lodging the first information report. The delay is of five days. In my view, for the said the prosecution case cannot be thrown in the dust bin inasmuch as not only the victim, but PW5 Kajal has offered explanation for the delay, which is plausible one. Not only that, from the evidence of PW6 Anjali, it is established that the families of the appellant and co-accused are practicing black magic and therefore, the entire citizenry

of village Fegad are under their fear. In view of this when the threat was extended to the victim and her sister Kajal (PW6) not to disclose said fact to the parents or grandmother or police, in my view, cannot be taken exception and it is, in my view, most natural. The victim was thereafter suffering pain in her stomach due to the sexual assault on her in her very primary age and therefore, there was no option for her but to disclose the incident. In that view of the matter, I reject the contention of the learned counsel for the appellant that the prosecution case is nothing but falsehood because of the delay.

14. PW7 Dr. Priyanka Shelkar had examined the victim. At the relevant time, she was working as a Gynecologist in Indira Gandhi Medical College, Nagpur, where the victim was referred under requisition (Exh.57). Victim's mother Lata (PW8) was accompanying her. The victim also gave history to said witness. The history as narrated by the victim was taken down by Dr. Priyanka in the medical report (Exh.58). Even at that time, it was stated by the victim to the Doctor that she was pushed inside the house of co-accused Golu by the appellant and thereafter rape was committed on her. Dr. Priyanka found that hymen of the victim was torn, though old one. I am not attaching much importance to it as tried to be

suggested by the learned counsel for the appellant, since the incident had occurred on 5th and she was examined on 10.08.2017, therefore, not noticing fresh tear of the hymen, in my view, is most natural one. However, evidence of Dr. Priyanka is that there was a sexual assault on the victim. The Chemical Analyser's report, though it is not exhibited, is admissible in evidence in view of sub-section 4 of Section 293 of the Code of Criminal Procedure. As per the law laid down by this Court in the case of **Omprakash S/o Gayaram Nirmalkar .vs. State of Maharashtra**, reported in **2016 All MR (Cri) 3337** (Coram : B.P. Dharmadhikari and V.M. Deshpande, JJ), merely because the Chemical Analyser's report is not exhibited that does not render the document as inadmissible and the same cannot be kept aside from zone of consideration. As per the Chemical Analyser's report, the undergarment of the victim was stained with blood and no explanation is there. Finding of undergarment stained with blood, in my view, is an incriminating circumstance especially when nothing is brought on record to show that during said period the victim was in her menses.

15. Evidence of the victim is in consonance with oral report (Exh.19) and her statement recorded under Section 164 of the Code of Criminal Procedure (Exh.22). Her evidence withstood to the

scrutiny of cross-examination, though there are some omissions, which are minor in nature and does not go to the root of the prosecution case.

16. There was no reason for the victim to falsely implicate the appellant. It is not the case of the victim that the appellant has committed rape on her. She has disclosed the truth before the Court that she was pushed inside the house of Golu and then asked the victim that she should allow co-accused Golu to have sex with her and for that she will be rewarded with money. In my view, the submission of the learned counsel for the appellant that the victim was a consenting party has to be shown the exit door outrightly in view of the fact that the victim was minor and was “child” within the meaning of the provisions of the POCSO Act.

17. There is a presumption available in favour of the prosecution under Section 29 of the POCSO Act. The same reads as under :

“29. Presumption as to certain offences - Where a person is prosecuted to commit any offence under Sections 3, 5, 7 and section 9, the Special Court shall presume, that such person has committed or abetted or attempted to commit offence, as the case may be unless the contrary is proved.”



18. Though, the presumption is available in favour of the prosecution, it is rebuttable one. However, in the present case, once it is noticed that the prosecution has proved the foundational facts, it was for the accused persons to rebut the same by adducing evidence either by way of cross-examination or by way of independent evidence. Insofar as the appellant is concerned, he has not adduced any independent evidence. Even from the line of cross-examination of the material prosecution witnesses, the presumption is not rebutted. Not only that, though an attempt was made on the part of co-accused that the day of the incident was Rakhi Pournima, nothing was brought on record to show that the said day was Rakhi Pournima. Therefore, in my view, the learned Judge of the trial Court was right in rejecting said defence also.

19. Section 16 of the POCSO Act reads as under :

“16. Abetment of an offence” – A person abets an offence, who -

First. -- Instigates any person to do that offence ; or

Secondly – Engages with one or more other person or persons in any conspiracy for the doing of that offence, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that offence ; or

Thirdly – Intentionally aids, by any act or illegal omission, the doing of that offence.”



Similarly, Section 109 of the Indian Penal Code reads as under :

“109. Punishment of abetment if the act abetted is committed in consequence and where no express provision is made for its punishment. - Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.”

20. Evidence of the prosecution witnesses would clearly establish that it is the appellant who has intentionally extended aid to the co-accused to commit rape on the victim. The evidence on record has established that when the victim was pushed inside by the appellant, he latched the door from outside and not only that, he guarded the house from outside. Further, he tried to prevent Kajal from taking entry inside the house. That shows that the appellant was having active role in commission of the offence of rape by co-accused Golu. The acts committed by the appellant which are duly proved by the victim and other prosecution witnesses, in my view, proves that the appellant was abettor and he abetted co-accused Golu to commit rape on the victim, a minor girl.

21. In totality of the circumstances, I am of the view that there is no error in the impugned judgment and on re-appreciation

of the entire prosecution case, I am of the view that the prosecution has proved its case against the appellant in its entirety and he is sentenced correctly by the learned Judge. Consequently, I pass the following order :

ORDER

1. The criminal appeal is dismissed.
2. The judgment and order of sentence passed by the learned Extra Joint Additional Sessions Judge, Nagpur in Special Child Protection Case No. 246/2017 dated 25.03.2019 convicting the appellant for the offence punishable under sections 376(2)(i)(j) read with Section 109 and under Sections 354, 354A and 342 of the Indian Penal Code and also for the offence punishable under Sections 16 and 17 read with Sections 3 and 4 of the POSCO Act, is hereby maintained.
3. The appellant, who is in jail, shall undergo remainder of his jail sentence.

V. M. Deshpande, J.

Diwale