



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

CRIMINAL APPEAL NO. 277 OF 2020

APPELLANT : Santosh S/o Devanand Chikhlonde,
Aged 25 years, Occu. Labour,
R/o Jabbartola, Tah. Gondia, Dist. Gondia.

VERSUS

RESPONDENT : 1] State of Maharashtra,
through Police Station Officer,
Police Station, Gondia (Rural), Dist. Gondia.

2] XYZ (Victim),
through its complainant,
Crime No. 31/2015, registered with
Police Station, Gondia Gramin, Dist. Gondia.

Mr. Mir Nagman Ali, Advocate for the appellant
Mrs. M. R. Kavimandan, A.P.P. for the respondent no.1-State
Ms. Kirti Deshpande, Advocate for the respondent no.2

CORAM : G. A. SANAP, J
DATED : JUNE 25, 2024.

ORAL JUDGMENT

1. In this appeal, challenge is to the judgment and order dated 13.02.2020, passed by learned Additional Sessions Judge, Gondia, whereby the learned Judge, on conviction of the accused, sentenced him to undergo rigorous imprisonment for 10 (ten) years and to pay fine of Rs.30,000/-

(Rupees Thirty thousand only) for the offence punishable under Section 376(2)(f)(i) of the Indian Penal Code. Though, the accused was convicted for the offence under Section 5(m)(n), punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as “the POCSO Act” for short), no separate sentence was awarded.

2. BACKGROUND FACTS :-

The victim girl in this case, at the relevant time, was about 10 years old. The informant (PW1) is the mother of the victim. The father of the victim is working as a driver in a mill. The in-laws of the informant are residing separately in adjoining house. The FIR reveals that on 23.05.2015 at about 10.00 a.m., the informant along with two daughters went to the house of her elder brother-in-law to watch the marriage procession. She was sitting in the courtyard of the house of her brother-in-law where the marriage procession was passing through the road. Thereafter, at about 12.00 noon, her younger daughter started crying and therefore, she decided to go back to her home. The victim was playing in the nearby area. The informant called the victim to accompany her. It is alleged that at that time, within few minutes, the victim came out of the cattle shed of the house of her brother-in-law. The informant saw her nephew/accused running away from the spot. The informant noticed that there was mud stuck to the back side of the head of the victim and

therefore, she became suspicious. After reaching home, she questioned the victim, on which she started crying and told her that the accused in the cattle shed made her lie on the floor, removed her clothes and slept on her person and since then she is having pain in her private part. The informant removed underwear of the victim and found blood stains on her private part. The private part had become reddish and inflamed. Her underwear was wet. Thereafter, the informant went to the police station and reported the matter to the police.

3. On the basis of the report, crime bearing No. 31/2015 was registered at Gondia Rural Police Station for the offence punishable under Section 376(2)(f)(i) of the IPC and under Section 6 of the POCSO Act. API J.M. Nayade conducted the investigation. The victim was sent for medical examination. After completion of the investigation, charge-sheet was filed against the accused.

4. Learned Additional Sessions Judge, on committal of the case, framed charge (Exh.25) against the accused. The accused pleaded not guilty. The prosecution examined ten witnesses to prove the charge. Learned Judge, on consideration of the evidence, held the accused guilty and sentenced him as above. The accused is, therefore, before this Court in appeal.

5. I have heard Mr. Mir Nagman Ali, learned advocate for the appellant, learned Additional Public Prosecutor for the State and Ms. Kirti Deshpande, learned advocate for respondent no.2/victim. Perused the record and proceedings.

6. Mr. Ali, learned advocate for the appellant submitted that the learned Judge has failed to properly appreciate the evidence and as such has come to a wrong conclusion. Learned advocate submitted that the offence of rape and penetrative sexual assault has not been made out against the accused. Learned advocate took me through the evidence of the informant (PW1), the victim (PW2) and the medical evidence. On the basis of this evidence, learned advocate submitted that at the most, the offence punishable under Section 376 r/w section 511 of the IPC and under Section 7 punishable under Section 8 of the POCSO Act would get attracted. Learned advocate submitted that the learned Judge has wrongly invoked Section 375, clause (c) of the IPC in this case to conclude that the offence of rape has been proved. Learned advocate submitted that oral evidence of the victim and the informant coupled with the medical certificate issued by the Doctor, is not sufficient to prove the offence of rape.

7. As against this, learned Additional Public Prosecutor submitted

that on the basis of the evidence adduced by the prosecution, the charge has been proved against the accused beyond doubt. Learned APP submitted that the evidence of Medical Officer (PW3) would be sufficient to conclude that the victim was subjected to sexual intercourse. Learned APP submitted that the evidence of the informant and the victim, if considered together with the opinion of the Medical Officer recorded in Exhs.42 and 34, would show that there was slight swelling over vagina. It was indicative of rubbing of vulva and vagina. Learned advocate submitted that the evidence on record is sufficient to prove that the accused manipulated vagina of the victim so as to cause penetration into her vagina, urethra or anus. Learned APP submitted that the finding recorded by the learned Judge is supported by the evidence. Learned APP submitted that no interference is warranted in the well reasoned judgment and order passed by the learned Additional Sessions Judge.

8. Ms. Deshpande, learned advocate for respondent no.2/victim adopted the submissions made by the learned APP for the State. Besides, learned advocate submitted that the defence of the accused is not at all probable. Learned advocate submitted that the informant (PW1) had no reason to falsely implicate the accused.

9. I have minutely perused the impugned judgment, the evidence of

prosecution witnesses and the documentary evidence. PW1 is the mother of the victim. It is undisputed that the accused is her nephew. She has stated that for the purpose of watching marriage procession, she went near the place of occurrence. This fact has been categorically stated in the report. She has stated that while watching marriage procession, her younger daughter started crying and therefore, she gave a call to the victim to accompany her to the house. She has stated that the victim came out of the cattle shed followed by the accused. Accused ran away from the spot. She found the mud stuck to the back side of the head of the victim. On being questioned, the victim narrated the incident to her. PW1 has stated that the birth date of the victim is 27.09.2007. There is no dispute about the age of the victim. There are two birth certificates of the victim on record, issued from the office the Registrar, Birth and Death, Khairlanji, Madhya Pradesh at Exhs.69 and 88. It is seen that the birth certificates are not challenged. Similarly, the date of birth of the victim is also not challenged. The birth certificates show that the victim was born at Khairlanji, Dist. Balaghat in the State of Madhya Pradesh on 27.09.2010. The birth certificates were collected by the Investigating Officer during the Course of investigation. It is, therefore, evident that on the date of the incident, the victim was “child” as defined under Section 2(d) of the POCSO Act.

10. It is the defence of the accused that there was enmity between the

father of the accused and husband of the informant and therefore, false report was lodged. As far as this defence is concerned, except the suggestion of enmity in cross-examination, no other material has been brought on record in the cross-examination of PW1 or by way of independent evidence to make this defence probable. The most important aspect, which is in favour of the case of the prosecution, is the prompt lodging of the FIR. The incident, as per the informant, occurred at about 10.00 a.m. The report was lodged on the very same day at 12.00 noon. Perusal of the report would show that father-in-law of the informant had accompanied her to the police station. There was no delay in lodging the report. It needs to be stated that the delay in lodging report results in embellishment, which is a creature of an afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, but danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. The accused is the nephew of the informant (PW1). The defence of enmity has not been probabalised. Prompt lodging of the report is the most important factor in favour of the case of the prosecution. It would reflect upon the credibility of the evidence of the witnesses. The evidence of the witnesses, namely, the victim and her mother, cannot be discarded and disbelieved on the basis of the suggestion of enmity.

11. The next important witness is the victim girl (PW2). In her evidence, she has narrated the first hand account of the incident. She has stated that she was playing in a cattle shed of the accused. The accused removed her underwear and made her lie on the floor. She has further stated that the accused lied on her person. She has categorically stated that then she felt burning sensation near her private part. As far as evidence of the victim is concerned, she has not stated that there was penetration of penis or insertion of any other object in her private part. She has stated that when the accused lied on her body, she felt burning sensation near her private part. The evidence of the victim girl, if appreciated in totality, would show that it is consistent as to the occurrence of the incident and the nature of the incident. The statement of the victim as to the occurrence of the incident cannot be discarded. The evidence of the mother (PW1) and the victim girl (PW2), who at the time of the incident was 10 years old, is sufficient to establish complicity of the accused in commission of the crime. The question that needs to be addressed in the backdrop of the submissions advanced by the learned advocate by the accused is about the actual offence made out in this case on the basis of the evidence of the victim and the Medical Officer.

12. In this background, it would be necessary to appreciate the evidence of the Medical officer (PW3). The victim was referred for medical

examination on 24.05.2015. The evidence of the Medical Officer (PW3) coupled with the medical report, needs proper appreciation. She has stated that on 24.04.2015, she was working as a Gynaecologist at BGW Hospital, Gondia. She has stated that a minor victim girl, aged about 4 years old was brought for examination and on obtaining consent of her mother, she examined the victim girl. She has categorically deposed that there were no minor or major injuries over vulva and vagina. She has stated that her hymen was intact. There was no bleeding, but there was swelling on vulva and vagina. The medical examination report of the victim issued by her is at Exh.42. She has given opinion that sexual intercourse has not taken place in this case with the victim girl. She has further opined that as there was slight swelling over vagina, there was possibility of rubbing over vulva and vagina. She has further opined that there was possibility of an attempt of sexual assault. In my view, this opinion given by the Medical officer needs proper appreciation to come to a conclusion as to the actual offence made out in this case. The learned Judge has observed that the evidence on record is sufficient to prove the manipulation of a part of the body of the victim so as to cause penetration in vagina, urethra etc. by the accused. The learned Judge has observed that on the basis of this evidence, the offence of rape as defined under Section 375 of the IPC has been proved. Admittedly, the medical evidence is silent about penetration or even forcible attempt of penetration or even slightest

penetration. The evidence of the victim girl is also silent about it. She has not stated that any attempt of penetration or slightest penetration was made by the accused. She has stated that the accused lied on her person and therefore, she felt burning sensation near her private part. The victim has not narrated any specific act having been committed by the accused so that it could be said to be an attempt of penetration or even slightest penetration. In this context it would be appropriate to refer to the decision of the Hon'ble Apex Court in *Madan Lal .vs. State of Jammu and Kashmir*, reported at *AIR 1998 SC 386*. Paragraphs 11, 12 and 13 are relevant for the purpose of this case.

“11. In this context it is appropriate to notice an argument advanced by Mr. Jain, learned senior counsel appearing for the appellant to the effect that in the absence of any penetration into the vagina the offence of rape cannot be said to have been established and it will not be possible to hold that the accused had attempted to commit rape on the prosecutrix, and therefore, it would at the most amount to an offence of indecent assault under [Section 354](#) I.P.C. We are unable to accept this contention. Since, if the evidence of the prosecutrix is to be believed, and we do believe the same, the offence committed cannot but be held to be one of attempt to commit rape. The prosecutrix's evidence clearly establishes the fact that the accused spread the blanket on the floor and forcibly laid her on the blanket and thereupon the said accused forcibly opened the cord of the salwar of the prosecutrix and kept it apart and then forcibly ride upon her and on that point of time caught hold of her head with one hand and closed her mouth with the other and had kept his penis qua her uterus and was doing some thing and then the accused was trying to penetrate his penis but it did not penetrate and had gripped his penis with his hand and was rubbing it against her uterus which he was doing by jumping.

12. *The difference between preparation and an attempt to commit an offence consists chiefly in the greater degree of determination and what is necessary to prove for an offence of an attempt to commit rape has been committed is that the accused has gone beyond the stage of preparation. If an accused strips a girl naked and then making her flat on the ground undresses himself and then forcibly rubs his erected penis on the private part of the girl but fails to penetrate the same into Vagina and on such rubbing ejaculates himself then it is difficult for us to hold that it was a case of merely assault under Section 354 I.P.C. and not an attempt to commit rape under Section 376 read with 511 I.P.C. In the facts and circumstances of the present case the offence of an attempt to commit rape by accused has been clearly established and the High Court rightly convicted him under Section 376 read with 511 I.P.C.*

13. *Apart from the trustworthy evidence of the prosecutrix herself we also find several circumstances as found by the High Court which corroborates the prosecutrix evidence and makes her statement wholly reliable. Though PWs 1 and 2 did not support the prosecution and therefore were cross-examined by the prosecution but Ms. Shobha Rani, another classmate of the prosecutrix clearly deposed that Krishan, PW-2 came and called Sunita. PW-1 on behalf of the accused for cooking meal at the residence of Head Master and even thereafter a teacher namely, Sagar Singh informed Sunita that she was wanted by the accused. She further stated that the accused as well as the prosecutrix were absent from the school even till when she left at 1 p.m. The so-called teacher of the school on whose testimony the learned Sessions Judge heavily relied upon only have stated that the accused was present in the school till 1 p.m. but according to the prosecutrix she was confined to the house of the accuse till 3 p.m. and was subjected to sexual harassment and thus the evidence of the prosecutrix does not run counter to the evidence of the so-called teachers of the school who had narrated that the accused was in the school till 1 p.m. That apart the High Court has rightly relied upon the evidence of several other classmates of the prosecutrix like Mst. Rajni D/o Om Prakash, Pooran Chand S/o Nanak Chand, Manzoor Ahmad S/o Hafiz Ahmad and Somavani D/o Kaku who unequivocally stated that on the relevant date*

after 9 am. the prosecutrix as well as the accused were absent from the school. This lends credence to the story of the prosecutrix that she was sent to the house of the accused for cooking and thereafter the accused came to the house and committed the sexual assault. This would undoubtedly be a corroborating piece of evidence which the High Court has rightly relied upon. Then again the salwar of the prosecutrix was seized and had been sent to the Chemical Examiner for chemical analysis and the Scientific Officer of the Jammu and Kashmir, Forensic Science Laboratory after examining the said salwar reported that chemical and microscopical tests revealed the presence of semen/Human Spermatozoa on the said salwar. This is also a strong corroborative piece of evidence to the prosecutrix version even if it has not been established that the Human Spermatozoa is that of the accused. the statement of the mother of the prosecutrix to the effect that the prosecutrix narrated the entire episode immediately when she arrived at home can also be held to be a corroborative piece of evidence which the learned Sessions Judge excluded from consideration and in our view erroneously.”

13. In *Madan Lal's* case (supra), it is held that if the evidence on record is sufficient to establish that the accused has gone beyond the stage of preparation, then mere absence of penetration would not absolve him from the offence of attempt to commit rape. It is held that it would not be a case of mere assault under Section 354 of IPC. In my view, in this context, the evidence of the victim, her mother and the medical evidence would assume significance. The medical evidence does not corroborate the case of the prosecution as to the penetrative sexual assault. The evidence on record is sufficient to prove that the accused attempted to commit rape, however he could not commit penetrative sexual assault. The evidence, on its proper

appreciation, is not sufficient to establish the offence of actual rape. The evidence, however, is sufficient to prove the offence of an attempt to commit rape. The basic ingredients of the offence of rape, as defined under Section 375 of the IPC, have not been made out. Similarly, the offence of aggravated penetrative sexual assault, as defined under Section 5(m) & (n) of the POCSO Act has not been proved. The offence of attempt to commit rape has been proved. In my view, therefore, as far as the offence under the POCSO Act is concerned, Section 7 of the Act would get squarely attracted in this case. Section 7 defines sexual assault on a child and section 8 provides for punishment for sexual assault. Section 7 states that whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault. In the case on hand, the evidence on record clearly proves the intention of the accused while touching the vagina of the victim. The medical evidence and the opinion of the Medical Officer (PW3) clearly spells out the offence of sexual assault, as defined under Section 7 of the POCSO Act. On re-appreciation of the evidence, I am satisfied that the offences proved against the accused will be under Section 376 read with Section 511 of the IPC and under Section 7, punishable under section 8 of the POCSO Act. In view of this, the conviction recorded by the learned Additional Sessions Judge for the offence punishable under Section 376(2)(f)

(i) of the IPC and under Sections 5(m)(n) and 6 of the POCSO Act, is required to be set aside. It is accordingly set aside. The accused is convicted for the offence punishable under Section 376 read with Section 511 of the IPC and under Section 7, punishable under Section 8 of the POCSO Act.

14. As far as sentence is concerned, learned advocate for the appellant submitted that the accused has undergone the imprisonment for 4 years and 9 months. Learned advocate submitted that the minimum punishment provided under Section 376(1) is 10 years imprisonment and the maximum punishment may extend to imprisonment for life with fine. Learned advocate submitted that the offence of attempt to commit rape would, therefore, be punishable under Section 511 of the IPC and considering the minimum sentence of 10 years, provided under Section 376(1) of the IPC, for an offence of attempt to commit rape, one-half of 10 years imprisonment may be awarded as a sentence. In short, it is submitted that for the offence of an attempt to commit rape, five years rigorous imprisonment would be just and proper. It is further submitted that the maximum punishment provided under Section 8 of the POCSO Act is five years imprisonment.

15. Learned APP and learned advocate for the victim submitted that considering the overt act proved against the accused, the sentence of ten years' rigorous imprisonment for an attempt to commit rape would be necessary.

Learned APP and learned advocate for the victim submitted that considering the age of the victim in this crime, ten years imprisonment for this proved offence would be the proper punishment.

16. Admittedly, no separate sentence was awarded by the learned Judge for the proved offence under the POCSO Act. Learned Additional Sessions Judge sentenced the accused to suffer RI for 10 (ten) years for the offence punishable under Section 376(2)(f)(i) of the IPC and to pay fine of Rs.30,000/- with the default stipulation. In my view, considering the proved offence of attempt to commit rape, it would not be proper to award ten years rigorous imprisonment. In the facts and circumstances, the sentence of rigorous imprisonment for five years, would meet the ends of justice.

17. Accordingly, the Criminal Appeal is partly allowed.

i] The judgment and order dated 13.02.2020, passed by learned Additional Sessions Judge, Gondia, convicting the appellant for the offence punishable under Section 376(2)(f)(i) of the IPC and under Sections 5(m)(n) and 6 of the POCSO Act, is set aside.

ii] Accused - Santosh S/o Devanand Chikhlonde is convicted for the offence punishable under Section 376 read with Section 511 of the IPC and for the offence under Section 7, punishable under Section 8 of the POCSO Act.

iii] The appellant is sentenced to suffer rigorous imprisonment for 5 (five) years for the offence punishable under Section 376 read with Section 511 of the IPC. No separate sentence is awarded for the offence punishable under Section 8 of the POCSO Act.

iv] The sentence with regard to the fine and default sentence is maintained.

v] The appeal stands disposed of in the aforesaid terms.

(G. A. SANAP, J.)

Diwale