



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

CRIMINAL APPEAL NO. 420 OF 2022

APPELLANT : Suresh S/o. Kisan Surwade, Aged
about 32 Years, Occ. Labour, R/o.
Bori Adgaon, Tq. Khamgaon, District
Buldhana.

//VERSUS//

RESPONDENTS : 1. The State of Maharashtra, through
Police Station Officer, Police Station
Khamgaon Rural, District Buldhana.

Added respondent No.2 as
per Hon'ble Court's Order
dt. 15.06.2022. 2. XYZ (Victim) in Crime No.23/2020,
Police Station – Khamgaon Rural,
Tah. Khamgaon, Dist. Buldhana.

Mr. S.V. Sirpurkar, Advocate alongwith Ms. Garima Jain,
Advocate for the Appellant.
Mr. H.D. Futane, APP for Respondent No.1/State.
Mr. Sumit Joshi, Advocate (appointed) for Respondent No.2 is
absent.

CORAM : G. A. SANAP, J.
DATED : 5th SEPTEMBER, 2024.

JUDGMENT

. In this appeal, challenge is to the judgment and order
dated 26.10.2021, passed by the learned Special Judge, Khamgaon,
Distt. Buldhana, whereby the learned Judge convicted the accused

for the offences punishable under Sections 452 and 377 of the Indian Penal Code, 1860 (for short, “IPC”) and under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short, “POCSO Act”), and sentenced him to suffer simple imprisonment for one year and to pay a fine of Rs.5,000/- and in default to suffer simple imprisonment for one month for the offence punishable under Section 452 of the IPC; rigorous imprisonment for five years and to pay a fine of Rs.10,000/- and in default to suffer rigorous imprisonment for two months for the offence punishable under Section 377 of the IPC; and rigorous imprisonment for twenty years and to pay a fine of Rs.50,000/- and in default to suffer rigorous imprisonment for two years for the offence punishable under Section 6 of the POCSO Act. Separate sentence has not been awarded for the proved offences punishable under Sections 376(2)(j), 376(2)(l) and 376(3) of the IPC.

02] BACKGROUND FACTS:

PW-1 is the victim and informant in this case. Her oral report was recorded, and on the basis of the same, the crime was registered against the accused on 23rd January, 2020, at Khamgaon Rural Police Station. The case of prosecution, which can be gathered from the report and other documents, is that the victim is

deaf and dumb. The victim is partially mental retarded. The incident occurred on 22nd January, 2020, at about 4:00 p.m. It is stated that the victim, on the date of the incident, was 13 years old. She was residing with her grandparents. The appellant/accused is the resident of the same village. The grandmother of the victim had gone out to meet her neighbour. The victim was in the house. The accused came to the house in drunken condition. The accused carried the victim in the bathroom. He removed his pant and underwear. He also removed the cloths and underwear of the victim. The accused put his penis into her mouth. Afterwards, the accused bent her down and committed sexual assault on her. In short, it is the case of prosecution that the accused committed sexual intercourse, sodomy and fellatio with the victim. The victim raised the shouts and called her grandfather. The accused ran away from the spot. The grandmother of the victim came back after some time. The victim narrated the incident to her grandmother. The aunt of the victim also came to their house. The victim, on enquiry by her aunt, narrated the incident to her. On that day, since it was late in the night, they did not go to the police station. On the next day, the grandmother and the aunt of the victim carried her to the police station. In the police station, the police summoned Mrs. Sarita Jagdish Patil, who is the teacher and

possessing a diploma in special education and serving in a Rotary Mentally Disabled School at Khamgaon, for assistance. The victim narrated the incident through Sarita Jagdish Patil. The report was reduced into writing. On the basis of the report, a Crime bearing No.23/2020 was registered against the appellant/accused.

03] PW-8 conducted the investigation. He arrested the accused. He sent the victim for medical examination. The accused was also medically examined. The cloths of the victim as well as the cloths of the accused were seized. The samples were collected from the spot. He recorded the statements of the witnesses. After completion of the investigation, he filed the charge-sheet in the Court against the accused.

04] The learned Special Judge framed the charge against the accused. The accused pleaded not guilty. His defence is of false implication on account of their dispute with regard to the purchase of the property of the grandfather of the victim through the father of the victim. The prosecution, in order to bring home the guilt of the accused, examined 8 witnesses. The learned Judge, on consideration of the evidence, found it sufficient to prove the charge. The learned Judge accordingly convicted and sentenced the

accused as above. The appellant/accused has knocked the doors of this Court by way of this appeal against the said judgment and order.

05] I have heard Mr. S.V. Sirpurkar, learned advocate for the appellant/accused and Mr. H.D. Futane, learned APP for respondent No.1. Perused the record and proceedings.

06] Learned advocate for the appellant submitted that the evidence adduced by the prosecution is not sufficient to prove the charge beyond reasonable doubt. There are major inconsistencies and discrepancies in the evidence of the prosecution witnesses. The contradictory version of the incident narrated by the victim and other witnesses is sufficient to create a doubt about the case of prosecution. Learned advocate submitted that the victim is deaf and dumb. It is further pointed out that the victim, as per the case of prosecution, is suffering from partial mental disablement. The victim was not examined by the psychologist or any other expert to opine that she was mentally retarded. Learned advocate pointed out that the evidence of the victim was recorded with the help of the interpreter. The interpreter was not administered oath. The learned Judge, without administering oath to the interpreter and

recording her separate statement on oath, has proceeded to record the evidence of the victim. Learned advocate further pointed out that since the victim is deaf, dumb, and mentally disabled, the learned Judge was required to ascertain whether she was competent to depose before the Court or not. The learned Judge, without ascertaining the competence of the victim, administered oath to her. It is pointed out that this would go to the very foundation of the case of prosecution.

07] Learned advocate further submitted that there was more than 24 hours delay in lodging the report. The facts stated in the report are embellished and exaggerated. It creates a doubt about the case of prosecution. Learned advocate pointed out that the history of assault at the time of examination of the victim by the doctor was narrated by the victim. It shows that she was able to understand and answer the questions. Learned advocate took me through the evidence of the Medical Officer and pointed out that there was no injury on the body of the victim or on her private part. It is submitted that this fact, therefore, creates a doubt about the case of prosecution. Learned advocate submitted that the learned Special Judge has failed to consider all these aspects and has come to a wrong conclusion.

08] Learned APP submitted that failure to administer oath to the expert witness, with whose assistance the sign language was interpreted, could not be said to be illegality. It would be an irregularity. Learned APP submitted that the absence of injury on the body as well as on the private part of the victim could not be the ground to reject otherwise concrete, cogent, and reliable evidence of the victim and other witnesses. Learned APP submitted that the first-hand account of the incident narrated by the victim by itself is sufficient to maintain the conviction and sentence. The conduct of the victim as well as the conduct of her grandmother and her aunt is consistent. It is submitted that some omissions and inconsistencies in the evidence are bound to occur. However, on the basis of such minor omissions and inconsistencies, otherwise credible evidence cannot be discarded. Learned APP submitted that the learned Judge has considered all these aspects. Learned APP submitted that the crime committed by the accused was against the deaf, dumb, and partially mental disabled girl, and therefore, it warrants a strict view. Learned APP submitted that the accused had crossed all the norms of humanity by committing rape on the victim.

09] I have minutely perused the evidence on record. Admittedly, there was more than 24 hours delay in lodging the report. It is stated that since it was late in the night on the date of the incident, the grandmother of the victim and the aunt of the victim could not go to the police station. The incident was narrated to them by the victim in the evening of 22nd January, 2020. They went to the Rural Police Station, Khamgaon, and lodged the report on 23rd January, 2020 at 6:00 p.m. It is not the case of prosecution that the village of the victim is far away from the police station. The victim was sent for medical examination. On examination, the doctor did not find any injury on her body as well as on her private part. The cloths of the victim and the accused were seized and sent for R.F.S.L., Nagpur, for analysis. The blood detected on the knickers of the victim was of AB group. The blood group of the victim is AB. The CA report of the analysis of the samples and the cloths of the victim is at Exhs.68 and 69. Exh.70 is the CA report of the analysis of the blood and other samples related to the accused. His blood group is 'O'. No blood or semen was detected on the cloths of the accused. Similarly, no semen was detected on the cloths of the victim. The CA report, therefore, does not corroborate the case of prosecution. Similarly, the medical examination report of the victim also does not corroborate the case

of prosecution.

10] As far as the age of the victim is concerned, the accused has not seriously denied the documents placed on record by the prosecution. PW-8 has deposed that, during the course of investigation, he had obtained the birth certificate of the victim from Gram Panchayat, Bori. The requisition letter to the Secretary of the Gram Panchayat is at Exh.65. The birth certificate is at Exh.64. It is to be noted that the birth certificate obtained from the Gram Panchayat under the signature of the Secretary of the Gram Panchayat is a public document. This document, therefore, attracts the presumption under the law. Perusal of this certificate would show that the registration number of the birth certificate is 2 and the date of registration is 30th January, 2008. The date of birth of the victim recorded in the Gram Panchayat record is 1st January, 2008. The certified copy of the birth certificate, which was issued on 14th February, 2020, to the Investigating Officer, contains all the details and particulars. The accused has not challenged this document. Similarly, the accused has not challenged the evidence of the witnesses, who have stated that, on the date of the incident, the victim was 13 years old. This evidence is sufficient to prove that, on the date of the incident, the victim was a child as defined

under Section 2(1)(d) of the POCSO Act.

11] It is the case of prosecution that the victim is deaf and dumb. Similarly, it is the case of prosecution that the victim suffers from partial mental disability. The victim was examined by the doctor (PW-6). The doctor had examined her for the purpose of finding out whether there was sexual assault on her or not. The doctor was not a psychiatrist or psychologist. The doctor has stated that, at the time of her examination, she found that the victim was talking and sometimes remaining silent or making irrelevant talk. So, the victim was not examined to determine her mental capacity by PW-6. It was the duty of the Investigating Officer to send the victim to a specialist for examination to find out the percentage of deafness and dumbness of the victim. Similarly, it was necessary to ascertain the percentage of her mental disability. It was necessary to ascertain her IQ through the expert.

12] The learned Judge, as can be seen from the judgment and order, has recorded a finding that the victim was suffering from partial mental disability. In my view, this finding is without any evidence. The conviction and sentence under the relevant section has been awarded on the assumption that the victim was deaf and

dumb and suffering from partial mental disability. In the absence of any concrete evidence, the learned Judge was not right in coming to this conclusion. The grandmother of the victim has stated that they did not obtain the disability certificate of the victim. In my view, therefore, this finding of the learned Judge cannot be sustained.

13] It is to be noted that there is a flaw in the procedure followed by the learned Judge while recording the evidence of the victim. The learned Judge, as can be seen from the record, without making a preliminary enquiry with the victim to ascertain whether she is competent to depose or not, straightaway administered oath to her. The victim, as per the record produced before the learned Judge, was deaf and dumb. She was also suffering from partial mental disability. The learned Judge was required to ascertain by making an enquiry as to whether the victim is in a position to understand the importance of oath. It is further pertinent to note that the learned Judge took the help of the teacher, who was teaching the disabled children at Rotary Mentally Disabled School at Khamgaon. It is further seen that the learned Judge did not administer oath to the interpreter, Sarita Jagdish Patil. It appears that this exercise undertaken by the learned Judge was a casual

exercise. The learned Judge did not display seriousness and sensitivity to the issue before her. As far as the interpreter is concerned, it was the duty of the learned Judge to separately administer the oath to the witness. It was necessary on the part of the Judge to record the evidence of that witness about her qualification and about her expertise. The learned judge, briefly recording certain facts about her employment and about her diploma and straightaway proceeded to record the examination-in-chief of the victim.

14] Learned advocate for the appellant, relying upon a decision of the Hon'ble Apex Court in the case of ***State of Rajasthan Vs. Darshan Singh @ Darshan Lal [(2012) 5 SCC 789]***, submitted that this could not be said to be a mere irregularity. It is submitted that this is illegality. Learned advocate submitted that this position has been considered by the Hon'ble Apex Court in the case of ***State of Rajasthan Vs. Darshan Singh @ Darshan Lal*** (supra). In my view, paragraphs 28 and 29 of the reported decision are relevant, and therefore, the same are extracted below.

“28. Language is much more than words. Like all other languages, communication by way of signs has some inherent limitations, since it may be difficult to

comprehend what the user is attempting to convey. But a dumb person need not be prevented from being a credible and reliable witness merely due to his/her physical disability. Such a person though unable to speak may convey himself through writing, if literate or through signs and gestures, if he is unable to read and write. A case in point is the silent movies which were understood widely because they were able to communicate ideas to people through novel signs and gestures. Emphasised body language and facial expression enabled the audience to comprehend the intended message.

29. To sum up, a deaf and dumb person is a competent witness. If in the opinion of the Court, oath can be administered to him/her, it should be so done. Such a witness, if able to read and write, it is desirable to record his statement giving him questions in writing and seeking answers in writing. In case the witness is not able to read and write, his statement can be recorded in sign language with the aid of interpreter, if found necessary. In case the interpreter is provided, he should be a person of the same surrounding but should not have any interest in the case and he should be administered oath.”

15] In this case, the Apex Court has held that in case the witness is not able to read and write, his statement can be recorded in sign language with the aid of interpreter, if found necessary. It is further held that in case the interpreter is provided, he should be a person of the same surrounding but should not have any interest in

the case, and he should be administered oath. In my view, if the procedure followed by the learned Judge is considered in the teeth of this settled position in law, it would show that this is a major flaw in the case of prosecution. The oath was not administered to the interpreter. It is to be noted that the services of this expert witness had been availed by the Investigating Officer at the time of recording the FIR. It is to be noted that the learned Judge was required to record the detailed statement of this expert witness as to the services provided by her on the request of the police, while lodging the report and her opinion and observation relating thereto. It is to be noted that this procedural requirement is not a mere formality. It needs to be stated that such compliance of the procedural provisions must be effective and meaningful.

16] The next important question is about the credibility and trustworthiness of the evidence adduced by the prosecution. It is to be noted that there was more than 24 hours delay in lodging the report. The delay, as can be seen from the report, has not been properly and satisfactorily explained. It has been stated by PW-2 and PW-3 that they came to know about the incident in the evening of 22nd January, 2020, and therefore, it was late in the night and they could not go to the police station. They were

expected to go to the police station in the morning. They went to the police station in the evening of 23rd January, 2020. There is no explanation about this delay. The evidence is silent about the distance between their village Bori and Khamgaon Rural Police Station. It is also not their case that the police station is far away and there is no conveyance facility, and therefore they reached there in the evening at 6:00 p.m. In my view, this unexplained delay is also fatal to the case of prosecution.

17] In the above context, delay of 24 hours in lodging the report assumes importance. The Hon'ble Apex Court in the case of *State of Rajasthan Vs. Om Prakash (2002) 5 SCC 745* has dealt with this point in great detail. The Hon'ble Apex Court has observed that delay in lodging the first information report quite often 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, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation.

18] In this case, therefore, the possibility of exaggeration and embellishment cannot be ruled out. The doctor, on examination of

the victim, did not find any injury on her body as well as on her genitals. The absence of the injury has further compounded the problems of the prosecution.

19] PW-1 is the victim. She has stated, in her evidence, that her grandmother and grandfather were not at house. She has identified the accused. She has stated that the accused committed rape on her. She has stated that the accused committed carnal intercourse with her. She has also stated that the accused put his penis into her mouth. She has stated about rape, sodomy and fellatio. She has stated that, after committing the act, the accused left the house. She has stated that when her grandfather and grandmother came back, she narrated the incident to them. She has stated that afterwards, she was taken to Khamgaon Gramin Police Station. Her report is Exh.23. It was recorded in question and answer form with the help of Sarita Jagdish Patil, a teacher attached to Rotary Mentally Disabled Children's School at Khamgaon. In her cross-examination, she has stated that they have goats. She has further stated that her grandfather had gone to graze the goats. She has stated that she cleans the goatshed. The victim has categorically stated that her grandmother and grandfather were not at home, and in their absence, this act was committed by the accused.

Perusal of the report would show that she is silent about the rape. In her report, she has only stated that the accused raped her from behind and put his penis into her mouth. The report, therefore, suggests that it was carnal intercourse. The doctor did not notice any injury to her anus.

20] PW-2 is the grandmother of the victim. She has stated that, on the date of the incident, she was at home. The incident occurred on Wednesday. On that day, she had gone to the house of her sister Bhimabai. The house of Bhimabai is far away from her house. She has stated that her grandsons Siddhant and Sangarch were with her and the victim was at house. She has further stated that her husband was sleeping on the cot outside the house. She has stated that when she left for her sister's house, the accused had come to their house in a drunken condition and he was sitting on the cot. She has stated that at 5:00 p.m., she came back from the house of her sister, and at that time, the victim narrated the incident to her. She has stated that thereafter she called her daughter-in-law Pratibha. Pratibha also made enquiry with the victim, and the victim narrated the incident to her. The evidence of this witness would show that the victim told her that the accused had committed carnal intercourse with her and had put his penis

into her mouth. She is silent about sexual intercourse. In her cross-examination, she has stated that the accused is residing at some distance from their house. She has stated that, in front of their house, there is a small shop of one Pintya. It has come on record that Wednesday is the market day of the village. So far as the victim and this witness are concerned, there is material contradiction. The victim has stated that her grandfather was also not at the house. Whereas, the grandmother has stated that the grandfather was sleeping outside the house. The grandfather has not been examined. It is also not the case of prosecution that, immediately after the occurrence of the incident, the victim either cried or narrated the incident to her grandfather. In my view, this conduct is not consistent.

21] PW-3 is the aunt of the victim. She has stated that the victim is mentally disabled. She has stated that the mother of the victim was ill, and therefore, she was residing with her parents. She has stated that there is a kirana shop in front of the house of her grandmother. She has stated that she was proceeding to bring groceries from the said shop, and on the way she went to their house, and at that time, her grandmother narrated the incident to her. PW-2 has stated that she called Pratibha when the incident was

narrated to her by the victim. Pratibha states that she went there for purchasing groceries and on the way met her grandmother, and at that time she narrated the incident to her. She has further stated that she personally enquired with the victim about the incident. She has stated that the victim told her that the accused had committed sexual intercourse with her. This witness has not stated that the victim told her that the accused committed carnal intercourse with her. She has stated that she accompanied the victim to the hospital at the time of her medical examination. She has stated that the history of assault was narrated to the doctor by the victim. On this count, there is contradiction in the case of prosecution. The report of the victim was recorded with the help of the teacher. This shows that the victim was not able to narrate the incident to the police. PW-3 has stated that the victim narrated the history of assault to the doctor. This appears to be doubtful.

22] PW-3 has also admitted that, on the opposite side of the house of PW-2, there is a kirana shop. It is to be noted that the existence of the shop in front of the house of PW-2 has been admitted by all the witnesses. On that day, it was the weekly market day of the village. It is not the case of the prosecution that the accused had closed the door of the house and then committed

the act. The victim did not raise the shouts. Similarly, the act of the accused did not attract the attention of the people at the shop. In my view, the material on record is not sufficient to prove the case of prosecution beyond reasonable doubt. The major inconsistencies in their evidence further fortify the doubt. The absence of the injuries on the person of the victim, despite having subjected to forcible sexual intercourse, is the most vital circumstance against the case of prosecution. In this case, except the bare words of the victim and other witnesses, there is no evidence to prove the charge. The evidence of the victim, on proper appreciation, cannot be believed.

23] It is the case of the accused that the father of the victim had agreed to sell their open plot to him for Rs.10,000/-. He had paid Rs.10,000/- to the father of the victim. He has stated that when he went to meet the grandfather and apprised him about this, he was annoyed. The grandfather had told the accused that they would not sell the plot to him. He has stated, in his evidence, that, in order to avoid the repayment of Rs.10,000/-, this concocted story was cooked up and, on the basis of the same, he has been falsely implicated.

24] In my view, the defence of the accused, if appreciated in the totality of the facts and circumstances, appears probable. The evidence on record is not cogent, concrete, and reliable to prove the charge. If the accused had committed forcible intercourse on the victim as stated, then the victim would have suffered injury. The absence of the injury on the private part of the victim is the most vital and important circumstance in favour of the defence of the accused. It is further case of the prosecution that the accused committed rape, sodomy and fellatio. In my view, it is totally unbelievable. In the facts and circumstances, I conclude that the learned Judge has failed to consider all these facts in proper perspective. The learned Judge has, therefore, committed a mistake. As such, the accused deserves to be acquitted. Hence, the following order:

ORDER

- i] The Criminal Appeal is **allowed**.
- ii] The judgment and order of conviction and sentence of the appellant/accused dated 26.10.2021, passed by the learned Special Judge, Khamgaon, Distt. Buldhana for the offences punishable under Sections 452, 376(2)(j), 376(2)(l), 376(3) and

377 of the IPC and under Section 6 of the POCSO Act, is quashed and set aside.

iii] The appellant/accused – Suresh Kisan Surwade is acquitted of the offences punishable under Sections 452, 376(2)(j), 376(2)(l), 376(3) and 377 of the IPC and under Section 6 of the POCSO Act.

iv] The appellant, who is in jail, shall be released forthwith, if not required in any other case.

v] The Criminal Appeal stands disposed of, accordingly.

(G. A. SANAP, J.)

Vijay