IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL No. 555 of 2003

Sk. Fakroddin S/o Sk. Mulana Saab,
Age : 40 Years, Occ. Business,
R/o. Degloor, Taluka Degloor,
District Nanded. ... Appellant
(Ori. Accused)

VERSUS

The State of Maharashtra, .. Respondent

....

Advocate for the appellant : Mr. S. J. Salunke
A.P.P. for Respondent/State : Mr. S. R. Wakale

....

CORAM : NITIN B. SURYAWANSHI AND
SANDIPKUMAR C. MORE, JJ.

RESERVED ON : 07th JULY, 2025
PRONOUNCED ON : 11th JULY,2025

JUDGMENT (PER SANDIPKUMAR C. MORE, J):-

1. The appellant/accused Shaikh Fakruddin Shaikh Maulna Saab, resident of Degloor, District Nanded, has challenged his conviction in Sessions Case No. 35 of 1999 at the hands of learned Additional Sessions Judge, Biloli (hereinafter referred to as " the trial Court") for the offence under Section 376(2)(f) of the Indian Penal Code, under the judgment and order dated 25.07.2003. Learned trial Court has convicted the appellant/accused for the aforesaid offence and sentenced him to suffer life imprisonment and to pay fine of Rs. 1,000/-, in default to suffer R.I for seven days.

2. The prosecution case as reflected from the report Exh.16 dated 14.02.1999 lodged by one Yusufabegum i.e. mother of the victim, is that the victim at the time of incident was aged about four years. She was residing with her parents, brothers and sister at Anand Nagar, Degloor, District Nanded. Her father was working in Degloor College. On the day of incident i.e. on 13.02.1999, it was 2nd Saturday and, as usual father of the victim had gone to Hanegaon. Mother of the victim was taking rest after finishing the usual household works. At about 2.30 p.m. victim told her that she intended to go to the house of her friend Reshma for playing. Reshma was the daughter of the appellant/accused. Accordingly, victim went to the house of Reshma at the relevant time. However, at about 4.00 p.m. on the same day she rushed back to her house and started crying by embracing her mother. When the complainant-mother asked her as to what happened, victim told her that the appellant/accused, who was wearing Lungi gave her sweet by name 'Banaras' and thereafter he made her to lie on the cot, and then sat on her abdomen. According to the victim, the appellant/accused inserted his private part in her place of urine. When the mother of the victim saw the private part of the victim, she found that it was swollen and

there were sticky stains on her knicker. Since the father of the victim was not at home, her mother called neighbours, namely Auyubai, Sultana, Kayyum bhai and Shabhana and told them about the incident. Father of the victim did not return on that day. The victim was crying whole night due to pains. On the next day early in the morning, the people from the community had come for *namaz* in the nearby mosque. The mother of the victim told one Ajimbhai about the incident. At that time Ajimbhai advised her to lodge a report. She disclosed the incident to her neighbour Mirza Sardar Beg and along with him, she lodged the report of the incident against the appellant/accused in Degloor Police Station.

3. On the basis of aforesaid report (Exh.16), Degloor Police Station registered crime No. 15 of 1999 against the appellant/accused for the offence punishable under Section 376(2) (f) of the Indian Penal Code. During the investigation, P.S.I. Kulkarni visited the place of the incident, recorded spot panchnama and made necessary seizures. He arrested the appellant/accused and referred the victim for medical examination to Nanded. He recorded the statements of witnesses and also sent the seized muddemal for chemical analysis. On completion of investigation, he filed charge sheet

against the appellant/accused for the aforesaid offence. The learned trial Court, after conducting trial, convicted the appellant/accused as mentioned above and hence this appeal.

4. Learned counsel for the appellant/accused submits that learned trial Court has not properly appreciated the evidence. According to him, mother of the victim i.e. P.W.1 Yusufabegum had lodged the F.I.R (Exh.16) merely on the say of the victim, who was unable to tell the details of the incident. He pointed out that the victim did not state as to what was inserted in her private part. He further pointed out that though the Medical officer i.e. P.W.6 Dr. Manisha Jadhav supported the case of the prosecution by deposing that hymen of the victim was torn and opined that there was forceful sexual intercourse with the victim, but rupture of hymen of the victim might be because of some other reasons also. According to him, the Chemical Analyst's report is in favour of the appellant/accused as no semen or blood was detected on the clothes of the victim. He submitted that, despite the story of prosecution that the appellant/accused committed forcible sexual intercourse with the victim of tender age, i.e. of just four years, but surprisingly there were no injuries found on the private part of the appellant/ accused. According to him

this circumstance is favourable to the appellant/ accused. He pointed out that the Investigating Officer had not recorded statement of victim under Section 161 of the Code of Criminal Procedure during the course of the investigation. According to him, certain questions put to the victim during the cross-examination certainly indicate tutoring. He then submitted that when the victim was tutored by her close relatives, then it was very difficult to secure admission favourable to the accused, and therefore, the testimony of the victim appeared un-trustworthy. He further submitted that, even after four to five years of the incident, the victim was unable to tell the exact incident, specially the fact as to what was inserted in her private part. Alternatively, the learned counsel for the appellant/ accused suggested that, at the most prosecution has established only the offence under Section 354 of the Indian Penal Code, for which, the punishment of imprisonment of 8 and½ month already undergone by the appellant/accused, is sufficient. Thus, he concluded that the prosecution could not establish the ingredients of offence under Section 376 of the IPC beyond all reasonable doubts. In support of his submission, he relied on the following judgments :-

(I) Mahadeo Vs. The State of Uttar Pradesh
(AIR 1973 Supreme Court 343)

(II) Rahim Beg Versus State of U. P.

(AIR 1973 Supreme Court 343)

(III) State of Punjab Versus Major Singh
1967 Cri. L. J. 1

(IV) Biren Mukhi Vs. State of Bihar
(1991 Supreme (Pat) 447)

(V) Sitaram Sambhaji Mane Versus
State of Maharashtra
[2019 Supreme(Bom.) 548]

5. On the contrary, the learned A.P.P. strongly supported the conviction recorded against the appellant/accused. He submitted that even the sole testimony of the victim in support of offence of rape irrespective of other corroborative evidence, is sufficient to record conviction against the accused. According to learned A.P.P., in the instant case, the evidence of victim is well corroborated by evidence of her mother, which is equally supported by the medical evidence on record. Thus, the learned A.P.P. submitted that, the prosecution has established the guilt of the accused beyond all reasonable doubts. Thus, he prayed for dismissal of the appeal. He also relied on the following judgments :-

(I) Aslam Versus State of Uttar Pradesh
(2014) 13 Supreme Court Cases 350

(II) Vishanu @ Andrya Vs. State of Maharashtra
(2006) 1 SCC 283

(III) Phool Singh Vs. State of Madhya Pradesh
(2022) 2 SCC 74

(IV) State of Himachal Vs. Raghabir Singh

(1993) 2 SCC 622

(V) Parayanamma Vs. State of Karnataka
(1994) 5 SCC 72 B

6. Heard rival submissions and also perused the entire material on record along with the impugned judgment and record and proceedings of the Sessions Case.

7. On going through the entire material on record, it is evident that the prosecution has in all examined eight witnesses, out of which, P.W.1 is the mother of the victim, whereas P.W.2 Sultana is the neighbour of victim's family. Though she did not support the case of the prosecution, but being the resident of area, where victim and accused were residing, her act of not supporting the prosecution case is obvious. Even otherwise also, a witness has his own reasons whether to support the prosecution case or not. Therefore, not much significance can be given to the act of this P.W.2 of not supporting the case of the prosecution. The next witness i,e. P.W.3 is the victim and naturally she has deposed as per the story of prosecution. The learned counsel for the appellant/ accused submitted that, Investigation Officer had not recorded statement of victim under Section 161 of the Code of Criminal Procedure. However, it is not requirement of law that without

recording such statement under Section 161 of the Code of Criminal Procedure, prosecution can not examine a witness who is necessary to prove its case. P.W.4 Mirja Beg is the panch of spot panchnama. However, in the instant case, the spot of the incident is not seriously disputed. Further, P.W.5 Babu Govindbhai Reddy is the panch witness on memorandum as well as discovery and we would like to discuss his evidence in the later part of the judgment, if found necessary. P.W.6 Dr. Manisha Jadhav is a Doctor, who had examined the victim, whereas P.W.7 Dr. Jitendra Bastwar had examined the accused. It is not case of the accused that he was unable to perform the sexual intercourse and, therefore, it has been established by the evidence of this witness that the accused was competent to perform sexual intercourse. Last witness i.e. P.W.8 P.S.I. Sanjay Kulkarni is the Investigating Officer and his evidence is mostly on the procedural aspects. Out of the aforesaid witnesses, the evidence of P.W.1 i.e. mother of the victim, then P.W. No.3 victim herself and P.W.6 Dr. Manisha Jadhav, who had examined her, appears significant to establish the case of the prosecution.

8. P.W.1 Yusufabegum i.e. mother of the victim has given

details of the incident, which she gathered from the victim. This witness has specifically deposed as to how at the relevant time the victim had gone to the house of accused, who was also father of friend of victim. She then deposed that the victim, after 1 and 1 ½ hour, rushed back to home, and told her as to how appellant/accused molested her and established forcible sexual relations with her. She has also deposed as to how her daughter i.e. victim was in pains during the whole night. Further, her act of not approaching the police station immediately can be very well understood, because her husband had gone out of station and did not return back in the evening, but returned on the next day. According to this witness, on the next day early in the morning, she told the incident to one person, who had come to offer namaz, and on his advice, she decided to lodge a report against the appellant/accused. Accordingly, she lodged the report of the incident. Though this witness had undergone searching cross-examination from the side of the accused, but nothing adverse to the prosecution story has been brought on record. Thus, her testimony remained unshattered despite such searching cross-examination.

9. On the contrary, from the cross-examination of

this witness, the defence of the accused is disclosed. According to the appellant/accused, family of the victim had implicated him falsely as he refused to give road metal to parents of the victim. Such type of defene, by itself is not probable. Merely on such flimsy ground nobody will put on stake the future of his own child. Nobody would go to the extent of making false allegations of such nature on such ground. Thus, the defene of the appellant/accused appears highly inconvincible.

10. Thereafter, we come to evidence of victim herself which is of immense importance, to ascertain the criminal act of the appellant/accused. The victim in her deposition has specifically deposed that her father had given two rupees, and therefore, she had gone to house of her friend Reshma i.e. daughter of appellant/accused for bringing 'Banaras' (kind of sweets). The victim, then deposed specifically as to how the appellant/accused removed his pant, wore Lungi and then made her to lie on the cot, and then slept on her abdomen, and pressed her private part. The learned counsel for the appellant/accused tried to argue that the victim could not state before the Court as to what object was pressed on her private part. Though the victim could not state so, but she

had replied that she was too small to ascertain as to what was that object. However, the victim has specifically stated further that because of pressing of said object on her private part, she sustained extreme pains. Here it is to be noted that as per P.W.1 i.e. mother of the victim, the victim had told her that appellant/accused put his private part into her private part. Therefore, considering the answer of the victim that after pressing the object on her private part by the appellant/accused, she experienced extreme pains, no other inference can be drawn than that the appellant/accused must have inserted his penis in the private part of the victim. Further, the victim had also deposed that due to the act of accused, there was swelling on her private part and she was then taken to hospital. Here, it is to be noted that the age of the victim at the relevant time was merely of four years and, therefore, it can be easily inferred that she was not in a position to understand the criminal act of the accused and, therefore, there has to be some discrepancy in her evidence in respect of the incident. But, if her evidence is considered as a whole and in a broader frame, it certainly gives an impression that the appellant/accused must have committed forcible sexual intercourse with the victim.

11. The learned counsel for the appellant/accused also

tried to argue that the victim was tutored by her parents and, therefore, the evidence of the victim appeared trustworthy. For that purpose, he drew our attention to the questions put up to the victim during the cross-examination. One such question was that, whether the parents of the victim had told her to give such deposition, to which she answered in the affirmative. Admittedly, she answered in the affirmative for the aforesaid question in her cross-examination, but she again denied that she was making accusation on the say of her parents, and then on her own stated that, she recollected the incident. Thus, considering her immediate disclosure that she recollected the incident on her own, the possibility of being tutored by the parents is washed out.

12. The evidence of mother of the victim as well as victim is also corroborated by the version of P.W. 6 Dr. Manisha Jadhav, who had examined the victim immediately on the next day of the incident. This witness has specifically stated that as per the narration of the victim, she was having pains in her private part due to forceful insertion of something. Such history narrated by the victim definitely indicates the forceful sexual intercourse. Further, according to this witness, she also found hymenal tear on posterior side at 5 o' clock

position and it was red in colour. Further, it is also deposed that the age of that injury was approximately 12 to 48 hours. It indicates that the injury to hymen must be because of the criminal act of the accused. This witness has further deposed that frock and inner wear of the victim along with the vaginal swab was sent for chemical analysis and her blood sample was also taken.

13. The learned counsel for the appellant/accused strongly submitted that despite such allegations against the appellant/accused, the chemical analysis reports Exhibits 32,33 and 34 could not establish the act alleged, as no semen or blood was found, either on the clothes of the victim or in her private part. It is significant to note that even after going through the chemical analysis reports, Dr. Manisha Jadhav i.e. P.W.6 maintained same opinion given by her that the hymenal tear found in the case of victim was possible by forceful insertion of penis. In the cross-examination this witness has specifically ruled out the possibility of having such type of hymenal injury due to fall on pointed and hard surface. Moreover, she has also opined that it is not necessary in every case of rape semen bound to appear in the vaginal swab. When asked about the absence of wide spread damage of

private part of the victim, this witness had answered that it was depending upon the extent of penetration. She has specifically observed that she was not in agreement that absence of such wide spread damage was indicative of absence of forceful penetration. Therefore, considering the evidence of P.W.1 i.e. mother of the victim, P.W.3 victim herself and P.W.6 Dr. Manisha Jadhav conjointly, it certainly proves the criminal act of the accused as alleged.

14. The learned counsel heavily relied on the judgment of the Hon'ble Apex Court in the case of ***Rahim Baig Versus State of U.P***. (supra) wherein it is observed that in case of rape alleged to have been committed by a fully developed man on a girl of 10 or 12 years, who was virgin and whose hymen was intact, then absence of injuries on the male organ of accused would point to his innocence. Admittedly, as per the evidence of P.W.7 Dr. Jitendra Vastwar, he did not find any injury on the male organ of accused, but from the evidence of P.W. 6 Dr. Manisha Jadhav, it has already been established that there was hymenal tear of the victim. Further, the Hon'ble Apex Court in the case of ***State of Himachal Pradesh Vs. Raghabir Singh***(supra) has made following observations :-

> " There is no inflexible axiom of law which lays down that the absence of injuries on the male organ of the accused would always be fatal to the prosecution case and would discredit the evidence of the prosecutrix, otherwise found to be reliable. The presence of injuries on the male organ may lend support to the prosecution case, but their absence is not always fatal. Every case has to be approached with realistic diversity based on peculiar facts and circumstances of that case. The doctor who had examined the respondent had found him to be capable of sexual intercourse and according to his opinion the absence of injury on his male organ was not suggestive of the fact that he had not indulged in sexual intercourse with the prosecutrix, then of tender years of age. His evidence was not at all challenged on this aspect by the defence."

Thus, in view of the aforesaid observations, it can definitely be inferred that mere absence of injuries on the male organ of the accused, cannot always be fatal to the prosecution. Therefore, we discard the theory of innocence putforth by the learned counsel for the appellant/accused on account of absence of injuries on his private part.

15. Learned Counsel for the appellant / accused, by

placing reliance on the judgment in the case of ***State of Punjab Vs. State of Uttar Pradesh (AIR 1973 Supreme Court 343)*** also tried to argue that considering the inability of victim as to what was inserted in her private part, the alleged criminal act of the accused can be converted into an offence under Section 354 of I.P.C. which is in respect of punishment for outraging the modesty of woman. On going through the aforesaid judgment, the Hon'ble Apex Court having regards to the facts of the case, observed that the action of accused interfering with the vagina of child was deliberate, and therefore, he must be deemed to have intended to outrage her modesty. However, the aforesaid observation had specifically come in the light of the facts of that case, because the victim in the said case was merely a baby of 7 & 1/2 months old and she had no awareness of sex. Therefore, the aforesaid observation is not at all helpful in the present case.

16. Learned Counsel for the appellant/accused, by relying upon the judgment in the case of ***Biren Mukhi Vs. State of Bihar*** (supra), also tried to argue that in view of lack of independent witnesses, the conviction of appellant/accused for the offence punishable under Section 376 (2) (f) of I.P.C. can be altered by observing that there was merely an attempt

of commission of rape. However, this observation also cannot be helpful to the appellant/accused in the instant case, since there is firm opinion of the Medical Officer about commission of rape on the victim.

17. Learned Counsel for the appellant/accused strenuously argued that C.A. reports on record are in fact favourable to the accused which lead to show that no criminal act as alleged, had taken place. Admittedly, in the C.A. reports on record no blood or semen detected either on private part of the victim or her clothes consisting frock and inner wear. But if the judgments relied upon by learned A.P.P. in support of the case of prosecution are perused, then the sum and substance of those judgments is that, sole testimony of prosecutrix without any further corroboration can be used for recording conviction against the accused, if it inspires confidence. Moreover, in the case of ***Parayanamma Vs. State of Karnataka*** (supra), relied upon by learned A.P.P., it has been observed by the Hon'ble Apex Court as follows :

> "With regard to the vaginal smear examination conducted at a different hospital, Dr. Reeta, PW 3 has reported that no spermatozoa was seen on it, and the absence of sperms has been viewed against the version of the prosecutrix. It was never elicited from the prosecutrix as to wether the two persons

> who committed rape on her had reached orgasm emitting semen in her private parts. No presumption can be made that penetration of penis in the private parts of a rape victim must necessarily lead to the discovery of spermatozoa. It is a question of detail and has to be put to test by cross-examination. Otherwise also there may be various other factors which may negative the presence of spermatozoa such as faulty taking of the smear, its preservation, quality of semen etc. The absence of spermatozoa *prima facie* could not be allowed to tell against the version of the prosecutrix."

In the light of aforesaid observation of the Hon'ble Apex Court, no benefit can be given to the appellant/accused of the fact that no semen or blood detected on private part or clothes of the victim.

18. Thus, considering the entire evidence on record, the prosecution has definitely established the guilt of accused beyond all reasonable doubts. Minor discrepancies in the evidence of victim are not on material aspect or in respect of core of the prosecution case. Further, the version of victim is well corroborated by her mother i.e.PW-1 and most importantly the alleged criminal act of the accused is definitely established

on the basis of medical evidence on record. Hence, the act of appellant/ accused of committing forcible sexual intercourse with the girl of his daughter's age has to be condemned and viewed seriously. Therefore, taking into consideration all these facts, we are of the opinion that the learned trial Court has properly appreciated the evidence on record while convicting the appellant/accused. As such, no interference is required in the impugned judgment. In the result, the appeal stands dismissed. The appellant / accused shall surrender himself before the concerned Police Station within three months to undergo the sentence awarded to him. His bail bond shall stand surrendered.

19. The appeal is accordingly disposed of.

(SANDIPKUMAR C. MORE)
JUDGE

(NITIN B. SURYAWANSHI)
JUDGE

Y.S. Kulkarni