

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 501 OF 2014

Damodar Pratapram Jangid
Age 39 years, Occu. Nil,
R/o Aarvi, Latur,
Tq. and District Latur
(At present in prison)

.. Appellant
(Orig. Accused)

Versus

The State of Maharashtra

.. Respondent

Mr. V.D. Hon, Sr. Advocate with Mr. A.V. Hon, Advocate for
the appellant
Mr. S.R. Palnitkar, A.P.P. for the respondent/State

CORAM : M.T. JOSHI, J.

RESERVED ON : 04/08/2015
PRONOUNCED ON : 10/08/2015

JUDGMENT :

. Heard both sides.

2. Aggrieved by the recording of the conviction by the learned Special Judge, Latur, vide judgment and order dated 30/07/2014 passed in Special Case (POCSO Act) No. 7 of 2013 for the offences punishable under section 376 of the Indian Penal Code and under section 4 of the Protection of Children from Sexual Offences Act,

2012 (for short "**POCSO Act**") and sentence to undergo rigorous imprisonment for 10 years on these counts and also of conviction for the offence punishable under section 506 of the Indian Penal Code and sentence to suffer rigorous imprisonment for 1 year, with direction to pay fine amount and with further direction to run the substantive sentences concurrently, the present appeal is preferred.

3. The prosecution case in short, is as under :-

. That the victim P.W. 3, a 15 years old girl was subjected to forcible sexual intercourse by the present appellant in his own house in the night between 10/4/2013 and 11/4/2013. The F.I.R. regarding the same was filed by the mother of the victim P.W. 1 on 12/4/2013.

. Admittedly, during the relevant period, the appellant with his family members consisting of his wife and son named as Shankar, were residing as the tenants in the ground floor of the house of the complainant and her family. The landlord family used to reside on the

upper floor.

. According to the prosecution, on 10/4/2013, the victim was sleeping in the house of the present appellant with the child - Shankar. In the night, the electricity was cut off at about 11.00 to 12.00 pm. At that time, the appellant and his wife were sleeping in the separate rooms. As the electricity was cut off, the appellant came into the room where the victim and his own son were sleeping. He started fanning his son by hand and, thereafter, gagged the mouth of the victim and committed forcible sexual intercourse with her. He threatened the victim that in case she divulged the incident to anybody, he would cause the death of the victim and her mother and would flee away to his home state Rajasthan. In the circumstances, the victim slept in the room itself under the apprehension.

. In the morning, she returned to the upper floor house and did not speak about the incident to anybody for whole of the day. In the evening, the complainant mother went outside and at that time, the victim narrated the incident to her brother and father.

However, none of them divulged the incident to the complainant – mother in the night. On the next day i.e. on 12/4/2013, when the complainant – mother went to her job in a college, at around 11:30 am, the husband of the complainant went to the college and narrated the incident to her. Therefore, the complainant took leave from the college and returned to her house and counselled the victim and got all the facts from her mouth and, thereafter, the complaint at Exhibit 22 was filed on 12/4/2013 at about 8:30 pm.

. The crime was registered. P.W. 8 – A.P.I. – Sanjay Nanware has carried the investigation. He recorded the statement of the victim and sent her for medical examination. The appellant was arrested. Panchanama of the spot of occurrence was recorded. Bedsheet from the spot was seized under a panchanama as well as the clothes of the prosecutrix were also seized. On 16/4/2013, the present appellant made a statement leading to the production of his clothes like the trouser, banian and underwear. Those were seized. Those articles alongwith the nail clippings, pubic hair, vaginal swab, blood etc. of the prosecutrix, as received

from the Medical Officer were also sent for chemical analysis.

. P.W. 4 Dr. Varsha Pawar had examined the prosecutrix. She also arranged for x-ray photographs to determine the age of the victim. Upon examination of the x-ray photographs, she opined that the age of the prosecutrix would be between 14 to 16 years old. Besides this, the copy of the original admission register of the victim from Wale English School, Latur was collected, which would show that the victim was born on 05/12/1997.

. The medical examination of the victim revealed that the sex character of the victim were fully developed. There was old tear to the hymen. There was no presence of seminal stains on the clothes of the prosecutrix which she had worn on 13/4/2013. Further, there were no marks of violence on the body.

4. Line of the defence, as is disclosed from the cross-examination and the statement made by the appellant is that the victim is not from the tradition

bound non-permissive society. Her mother is from a liberal family, where father of the mother had married to one Muslim lady while he was Rajput. The mother - P.W. 1 is however of dominating nature in her house. She had suspected that the victim had developed intimacy with the appellant. While her husband is educated only upto 7th standard and was carrying job of a watchman, the mother was B.A. and Master in Library Science. The mother was of the nature of easily making allegations against anybody. The mother of P.W. 1 - complainant, used to sell liquor and many cases for the same were slapped against her. In this situation, the complainant had obtained a hand-loan from the appellant. When the appellant asked for repayment, she started avoiding the same. A quarrel ensued and as a result of this state-of-affair, the mother of the victim has filed a false complaint against the appellant.

5. Before the learned Special Judge, Latur, in all 9 witnesses were examined. P.W. 1 is the mother and P.W. 2 is the father of the victim - P.W. 3. P.W. 4 - Dr. Varsha Pawar has examined the victim, as detailed

supra. P.W. 5 – Jitendra Saraf, panch to the alleged memorandum and discovery made by the appellant of his clothes, did not support the prosecution. P.W. 6 – Santosh Shetty is the panch to the panchanama of spot of occurrence, who had proved the same at Exhibit 38. P.W. 7 – Balasaheb Mane, the A.S.I. has registered the crime. P.W. 8 – A.P.I. Sanjay Nanware had carried the investigation and P.W. 9 – Rajesh Bakalikar, Supervisor of Wale English School, Latur had proved the certified copy of the extract of admission register at Exhibit 56 by bringing the original admission register in the Court.

6. The learned Special Judge found that the prosecution was able to prove its case beyond reasonable doubt, including the claim that the victim was below 18 years of age at the time of the incident. Therefore, the conviction and the sentences, as detailed supra, came to be recorded.

7. Mr. V.D. Hon, learned senior counsel appearing for the appellant made the following submissions :-

. That ridiculous allegations are made that the present appellant while being in his own house with his family members, has committed the forcible sexual intercourse with the victim. Further, the statement of the victim would show that he has committed forcible sexual intercourse over a cot admeasuring 6 feet X 4 feet, while his own son Shankar was sleeping on the same cot. The victim's case that the appellant gagged her mouth by one hand and removed her clothes by other hand, in the situation, is not acceptable as just by kicking around, the victim could have woke up the son of the appellant. Further, there is a delay in filing of the F.I.R. The evidence would reveal that the legal opinion was obtained before filing F.I.R. and even the personnel like bond writer and clerk of the Advocate i.e. brother of the mother had helped in filing the F.I.R.

. It was further alleged by the victim that after commission of first sexual intercourse, the appellant again returned after half an hour and asked the victim to come down on the floor, which she refused. Further, even after these activities, according to the

prosecution, she continued to sleep in the same room and did not rush to her house, which was up-stairs. Further, she did not disclose the incident till the evening to anybody. Ultimately, she disclosed the same to her father and brother but nobody has intimated the mother. Suddenly, however, on the next day, in the noon, father of the victim thought it fit to visit the work place of the mother to narrate the incident, instead of narrating the said incident privately in his own house in the morning. All these acts were branded as illogical by Mr. Hon.

. Further, highlighting certain omissions and contradictions in the prosecution case and adverting to the neutral medical evidence, he submits that reasonable benefit of doubt ought to have been extended by the learned Special Judge to the present appellant.

. In the circumstances, branding the prosecution case as totally improbable, Mr. Hon wanted that the appeal be allowed.

. In the alternative, Mr. Hon submitted that the appellant is the only earning member of his family.

Therefore, sentence of 10 years rigorous imprisonment imposed upon the appellant, would be harsh one and hence, he prayed for showing leniency in awarding the sentence in case this Court comes to the conclusion that the appellant has committed the offences.

. Mr. V.D. Hon, learned counsel for the appellant also relied on 22 authorities, to buttress his arguments regarding reliability of a single witness, absence of resistance or absence of marks of violence on the victim, absence of corroborating medical evidence. Delay in filing the F.I.R. and effect of the same being filed after consultation.

8. On the other hand, learned A.P.P. submitted that panchanama of the spot of occurrence would show that the appellant's bed room is at the fag end of the house and 8 feet X 10 feet passage is in between the said bedroom of the appellant and the front room, where child of the appellant with the victim was sleeping. The evidence would show that generally, the brother of the victim, namely, Deepak used to go to sleep with the child of the appellant, namely, Shankar, however, as

Deepak had caught cold, in the night of the incident, instead of him, the victim went to sleep with said Shankar. Thus, taking undue advantage of the situation, the appellant has carried the act. The victim being only 15 years old innocent girl was made powerless by the sudden advances of the appellant and, therefore, could not have thought prudently at that point of time.

. Learned A.P.P. further submits that the evidence on record would show that mother of the victim is the decision maker in the family. While she is B.A. and Master in Library Science, working in a college, her husband was merely a watchman. It has further come in the evidence that she suffers from blood pressure. In the circumstances, when either the victim or her father or brother did not think it fit to immediately narrate the incident to the mother in order to avoid any flare-up in the house itself in the presence of the appellant, but to console her away from the house in the college, and then narrate the incident, cannot be branded as an unnatural act. Further, since step-brother of the mother is a clerk of one Advocate, the act of the mother in calling him to assist in setting

the criminal law in motion, cannot be called as unnatural one.

. He further submits that the delay in filing the F.I.R. is thus satisfactorily explained. The defence at all is not probabalized. There was no reason for the family of the victim to make false accusations against the appellant, particularly when the evidence would show that the appellant was a newly inducted tenant in the premises and in the circumstances, he submits that the appeal be dismissed.

9. On the basis of this material, following points arise for my determination:-

I) Whether the prosecution has proved that the victim was below 18 years of age at the time of the incident ?

II) Whether the prosecution has proved that on 10/4/2013, in the night in his own room at Aarvi, Tq. & Dist. Latur, the present appellant committed forcible sexual intercourse with the victim ?

III) Whether the prosecution has further proved that at the given date, time and

place, the present appellant has caused criminal intimidation to the victim ?

My findings to all the above points are in the affirmative. The appeal is therefore dismissed as regards the conviction, however, is partly allowed as regards the sentences for the reasons to follow.

R E A S O N S

10. The victim, her mother and father deposed on the prosecution line. Though, it was tried to show that the son of the appellant, namely, Shankar was more than 9-10 years old, by suddenly showing the photograph of said Shankar to the victim during cross-examination to show that he (Shankar) was healthy, the purpose of the same is not clear.

. The mother of the victim admitted that her father is from Rajput caste and has married to one Muslim lady and also to a Rajput lady. Her step brother is Muslim by religion. She further admitted that her marriage is an inter-caste marriage. This, however,

would not mean that the victim is not from a tradition bound non-permissive society.

. It should be borne in mind that the mother of the victim has become Bachelor of Arts and Master of Library Science. She was able to secure a post of clerk in the college at Latur. Her husband was working as a watchman during the relevant period. They, admittedly own two storied house, out of which the ground floor was leased by them to the present appellant. The suggestion to the mother of the victim that many cases of illicit selling of liquor are pending against her mother, was denied by her. The suggestion that her brother was prosecuted for forgery case was also denied by her by saying that she is not aware of the same. The positive evidence in this regard could have been very well collected by the appellant.

11. It was explained in the cross-examination of the relevant witnesses that the mother of the victim is a patient of blood pressure. She is the decision maker in the house. In the circumstances, had the incident been disclosed to her either by the victim or her father

in the night of the incident itself, when the appellant was still comforting himself in the ground floor, the reaction of the mother could have been unpredictable. In the circumstances, when the father of the victim thought it fit to narrate the incident to her mother away from the house at her work place, cannot be called as unnatural one. The delay in filing the F.I.R. and seeking assistance of the step-brother by the mother of the victim, in the circumstances, is natural.

12. Admittedly, the mother of the victim had filed criminal case against one Raghuram Tompe previous to the present incident. We, however, do not know the nature of the same.

13. A 15 years old girl, if unknown to sex, is suddenly required to face the sexual assault in the night, as alleged, then one cannot assume that she would react in a very cool manner and start kicking around to woke up the child of the appellant.

14. The panchanama of the spot of occurrence proved on record would show that the bedroom of the appellant

and his wife is away from the front room where his son - Shankar was sleeping. There is a passage admeasuring 8 feet X 10 feet between these rooms. According to the victim, the door connecting the passage was closed by the appellant. Even the window was closed by him. Therefore, the story cannot be called as improbable one. The testimony of the prosecutrix in this regard, therefore inspires confidence. There was no reason for false implication of the present appellant by the parents of the victim.

. The case of the victim not being from a tradition bound non-permissive society, therefore is a slippery defence in the set of facts, as detailed supra. In the circumstances, there is no reason to disbelieve the straight forward testimony of the prosecutrix.

15. As regards age of the prosecutrix, the Medical Officer on the basis of the x-ray report, opined that her age was between 14 to 16 years. Though, the person who has obtained the x-ray is not examined, considering that margin of error in the opinion remains of two years, in my view, the medical opinion is not of much

help to the prosecution. However, P.W. 9 - Rajesh Bakalikar, the Supervisor of Wale English School had brought the original admission register of the school and proved the extract of the same regarding the victim, which would show that her date of birth was 05/12/1997. The fact that he himself has not made the entries or was unable to tell on what basis the date of birth was entered into the said register, are not required to be scrutinized in detail, as in ordinary course of transaction, old entries are found to be made in the admission register. In that view of the matter, there is no force in the appeal as regards the conviction.

16. As regards the reliance of various authorities/case laws by Mr. Hon, learned counsel for the appellant, it is to be noted that in criminal cases, however, each case has to be decided on its own facts. The reliance over the authorities, except wherein the principle of law is expounded, would be of no assistance to the appellant in such cases.

17. As regards the sentence, the learned Special Judge has observed that the victim was only 15 years and 4 months old at the time of the incident. There was no enmity between the two families. The very fact that the victim used to sleep in the house of the appellant with his small child (Shankar) goes to show the faith reposed by the family of the victim on the present appellant and, therefore, the learned Special Judge awarded rigorous imprisonment for 10 years on each of the counts i.e. for the offences punishable under section 376 of the Indian Penal Code and under section 4 of the Protection of Children from Sexual Offences Act, 2012 with direction to pay fine. All the substantive sentences were directed to run concurrently.

18. The offences punishable under section 376 of the Indian Penal Code and section 4 of the POCSO Act calls for a minimum imprisonment for a period of 7 years on each counts. If one takes into consideration the fact that the present appellant is a middle aged businessman, whose family is his dependent, then instead of rigorous imprisonment for 10 years, in my view,

awarding the statutorily minimum sentences would meet the ends of justice. In the result, the following order:-

19. Criminal Appeal is dismissed as regards the conviction recorded by the learned Special Judge, Latur on each of the counts.

20. The impugned judgment and order of the learned Special Judge, Latur as regards the sentences is however set aside.

. Instead, the appellant is directed to undergo rigorous imprisonment for a period of 7 years on the count of offences punishable under section 376 of the Indian Penal Code and section 4 of the Protection of Children from Sexual Offences Act, 2012. He is further directed to pay fine of Rs.25,000/-, in default to further undergo rigorous imprisonment for three months on both the counts jointly.

21. The appellant shall further suffer rigorous imprisonment for a period of 1 year for the offence

punishable under section 506 of the Indian Penal Code.

22. All the substantive sentences shall run concurrently.

23. Amount of fine, if realized, be paid to the prosecutrix as compensation, as awarded by the learned Special Judge, Latur.

24. The muddemal property be disposed of in terms of the directions issued by the learned Special Judge, Latur.

25. Criminal Appeal stands disposed of accordingly.

Sd/-
[M.T. JOSHI]
JUDGE

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