

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
CRIMINAL APPEAL NO. 659 OF 2014

Sudhakar S/o Sandipan Shelke,
Age : 67 years, Occu.: Agril,
R/o. Khamaswadi, Taluka Kallam,
District Osmanabad ..Appellant

VERSUS

- 1] The State of Maharashtra
Through Baliram S/o Kalyan Shelke,
Age : 40 years, Occu.: Agril,
r/o. Khamaswadi, Tal. Kallam,
Dist. Osmanabad.
- 2] Pooja D/o. Baliram Shelke,
Age : 7 years, Minor
Under Guardianship of her father,
Baliram S/o Kalyan Shelke,
Age : 40 years, Occu.: Agril,
r/o. Khamaswadi, Tal. Kallam,
Dist. Osmanabad.
- 3] Aarti d/o. Baliram Shelke,
Age : 4 years, Minor,
Under Guardianship of her father,
Baliram S/o Kalyan Shelke,
Age : 40 years, Occu.: Agril,
r/o. Khamaswadi, Tal. Kallam,
Dist. Osmanabad. ..Respondents

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Mr.S.S.Chaudhari, Advocate for the appellant
Ms.S.D.Shelke, A.P.P. for the State

CORAM : M.T. JOSHI, J.
JUDGMENT RESERVED ON : APRIL 24, 2015
JUDGMENT PRONOUNCED ON : APRIL 30, 2015

JUDGMENT :

Heard both sides.

2] Present appellant was convicted by learned Special Judge, Osmanabad in Special (Child Sex) Case No.14 of 2014, for the offences punishable under Section 4, 8 and 12 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as, "POCSO Act") and for the offences punishable under section 376 and 377 of the Indian Penal Code.

. He was sentenced to undergo rigorous imprisonment for seven years with fine of Rs.5,000/- (Rs.Five Thousand only) for the offence punishable under section 4 of POCSO Act. He was also sentenced to undergo rigorous imprisonment for three years with fine of Rs.2,000/- (Rs.Two Thousand Only) for the offence punishable under

section 8 of POCSO Act. He was also sentenced to undergo rigorous imprisonment for one year with fine of Rs.2,000/- (Rs. Two Thousand Only) for the offence punishable under section 12 of the POCSO Act. He was also sentenced to undergo rigorous imprisonment for seven years with fine of Rs.5,000/- (Rs.Five Thousand Only) and three years with fine of Rs.2,000/- (Rs. Two Thousand Only) for the offences punishable under section 376 and 377 of Indian Penal Code, respectively. All the sentences were directed to run concurrently.

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

. That the appellant was residing in the neighborhood of the complainant and his family members. The family members of the complainant includes his wife, his son and two daughters i.e. the victims of the offence, who were seven years and four years old, respectively, at the time of

the offence, which was committed on 19th March, 2014. The said offence was committed at about 3:30 p.m. in the house of the appellant. At that time, the complainant and his wife were in the field for labour work. Their son and two daughters were in the house. The children of the complainant usually used to visit the house of the appellant for the purpose of watching television show or for playing with grandchildren of the appellant. The appellant was sixty years old at the time of the occurrence.

4] In the circumstances, on 19th March, 2014, when the complainant and his wife returned to their house, at that time, their son told the complainant's wife that her niece, who was residing in the neighborhood, was talking about certain incident that has occurred in the noon. Therefore, the complainant's wife went to their neighborhood and inquired with the niece, as to

what had happened in the noon.

. The niece told in the presence of all the family members, that at about 3:00 pm. to 3:30 pm. in the noon, she heard certain television voice from the appellant's room, therefore, she went in the said room. At that time, she saw that the appellant had lifted his Dhoti and had put his penis in the mouth of one of the daughters of the complainant. After some time, he put his penis in the mouth of another daughter. Thereafter, he asked both his daughters to press his penis and also touched vagina and when the niece went forward, ultimately, the appellant gave Rs.Two each to the children in order to have some chocolates. Thereafter, all of them went to the shop and purchased chocolates lateron.

5] Upon hearing about the incident, the complainant's wife narrated it to the complainant. Thereafter, both of them went to the house of the

appellant to inquire him about the incident. He, however, had already left the house and was not seen for two-three days. Therefore, the complaint was filed on 22nd March, 2014 to the police station.

6] On the basis of the complaint, PW 6 – A.S.I. Kokane carried the investigation. He recorded statements of the victims and the niece of the complainant. The victims were sent for medical examination. The panchnama of the spot of occurrence was recorded. The appellant came to be arrested on 22nd March, 2014. The appellant was also referred to the Primary Health Center to ascertain as to whether, he was capable to have sexual intercourse and the necessary certificate was collected. The medical report regarding the victims would show that they were seven years and four years old, respectively. In the circumstances, the charge sheet came to be filed.

7] Before learned Special Judge, in all, six witnesses were examined. PW 1 is the complainant. PW 3 is his wife. PW 2 is seven years old victim of the offence. PW 4 is the niece – eye witness to the incident. PW 5 – Ashroba was claimed to be a witness as regards the panchnama of the spot occurrence. He, however, did not support the prosecution in this regard initially. He, however, lateron, accepted that he visited the spot and the map etc. drawn, is correct as per the map of the house as per the situation. PW 6 is the A.S.I., who carried the investigation.

8] The defence of the appellant was as under :-

. That he is sixty years old physically handicapped person. He has suffered accident in the year 2009-2010 and therefore, his right thigh had fracture, due to which, he was not able to sit

cross-legged. The complainant, in fact, was an agricultural labour while, the appellant was relatively rich, having 20 acres land. They were relatives. The complainant simply used to work as labour in the land of the appellant. The complainant had, earlier, obtained a hand loan of Rs.5,000/- from the appellant in the year 2013. Thereafter, however, he avoided to repay the same. Even he also avoided to work in the field of the appellant. In the circumstances, the appellant started making demands of the said money. However, the complainant always used to abuse him under the influence of the liquor. Further, there was jealousy between the families as the appellant was rich and the complainant was poor, though they were in relation. Therefore, he claimed that a false complaint came to be filed against him.

9] Learned Special Judge, however, found that the prosecution case is proved beyond the reasonable

doubt and therefore, the conviction and sentence, as detailed supra, came to be recorded against the appellant.

10] Mr. S.S.Choudhary, learned counsel for the appellant submitted that there was delay of three days in filing the of the F.I.R. In the complaint, though it is alleged that previously also the appellant had indulged into similar activities, no complaint in that regard to the police was filed and no details of the same were given. The prosecution witnesses admitted that the school time of the niece of the complainant as well as elder victim was between 10:00 am. and 4:00 pm. and therefore, there would not have been any possibility of occurrence of the incident at 3:30 pm. Further, there was variance in the time stated by the prosecution witnesses. The admission of the prosecution witnesses would show that some of the family members were present in another room

and therefore, according to him, it was highly impossible for the appellant to carry such activities. Mr.Chaudhary submits that the alleged victims of the offences were tutored by their mother, which has been admitted by the said witnesses. In the circumstances, Mr.Choudhary submits that the appeal may be allowed and the appellant may be acquitted.

11] On the other hand, Ms.Shelke, learned A.P.P. for the respondent – State, submits that the delay in filing the F.I.R. is sufficiently explained. The statement of the appellant himself, along with the panchanama of the spot of occurrence, would show that the spot of occurrence i.e. the television room, was separated from other rooms in the house. The prosecution witnesses admitted that sometimes, the complainant used to work in the field of the appellant. There is no material to show that there was any dispute between the

complainant and the appellant. Further, there was no reason for the complainant and his wife to involve the honour of the family by involving their tender aged daughters by taking them to the police station and ultimately, to the Court. In the circumstances, she submits that no interference in the reasoning of learned Special Judge, is warranted.

12] On the basis of this material, following point arises for my determination :-

i] Whether the prosecution has proved that on 19th March, 2014, at about 3.00 to 3.30 p.m., present appellant, at his residential house, manipulated the victims by inserting / penetrating his penis in the mouth of the victims and with a sexual intention, touched the vagina of the victims thereby amounting

to cause sexual harassment and sexual assault and acted against the order of the nature ?

. My finding to the above point is in the affirmative. The appeal is, therefore, dismissed for the reasons to follow.

13] The F.I.R. at exhibit 22 would show that though the incident has occurred on 19th March, 2014 at about 3.00 to 3.30 p.m., it was reported to the wife of the complainant and thereafter, to the complainant in the evening, as detailed supra. The F.I.R. would further show that upon getting the knowledge of the said offence, the complainant and his wife - PW 3, visited the house of the appellant to confront him, however, it was found that he continuously remained missing till the date of filing of the F.I.R. Ultimately, since on

earlier occasion also, the appellant had indulged into similar activities, the complaint came to be filed on 22nd March, 2014.

14] Before learned Special Judge also, similar reasons were forwarded by the respective witnesses. During the cross examination of respective witnesses, no suggestion was given to them that, the appellant was very well present at his house during the said period. It is admitted that the appellant as well as the complainant are relative to each other. The appellant, according to the complainant, was 60 years old. In that view of the matter, the explanation of the complainant and his wife, that they first thought it fit to confront the said fact to the appellant, is a reasonable explanation for filing belated F.I.R., as the appellant was not seen for three days in his house and ultimately, the complaint came to be

filed.

15] The prosecution case itself would show that the son of the complainant had told the wife of the complainant that some incident was to be narrated by the niece. Therefore, the wife went to the niece and got the information, which was lateron, verified with the elder victim and thereafter, the complaint was filed.

16] The elder victim i.e. PW 2 deposed that the present appellant, while watching a programme on the television, put his penis in the mouth of both of them one after another. Thereafter, he removed the underwear of the younger sister and took her on his hip. Thereafter, he started moving his hand on the private part of both the victims. In the meantime, the niece of the complainant came in the said room. She told that she would disclose the incident to the brother of the victims. Upon

which, the appellant gave an amount of Rs.2/- to each of them for purchasing chocolates and certain snacks.

17] PW 4 – niece, who is a 13 years old, had also deposed on the similar lines. She deposed that she went to the house of the appellant to play with is grandson – Bantya. He was not there. However, upon hearing noise of television, she went to the said room, which was to the backside of the house and watched the incident, which is detailed by her.

18] During the cross-examination, seven years old victim deposed that her mother taught her how to talk. She was further instructed as to, what is to be stated in the court. However, she denied the suggestion that she did not visit the house of the appellant and no such incident has occurred.

From these statements, it cannot be gathered that

there was complete tutoring of this seven years old victim. It is to be noted that she was only seven years old. If she was told as to, how to talk in the court and for what purpose, she was being taken to the court, the same would not amount to tutoring.

19] The niece of the complainant, who was thirteen years old, was also examined as an eye witness to the incident. The case, therefore, is not merely based on the statements of the child witness, where there would be defence of tutoring the witness, but the same was corroborated by a thirteen old eye witness to the incident.

20] As regards the possibility of presence of other family members of the appellant in the house, the elder victim has deposed that the

daughter-in-law of the appellant and daughter-in-

law's child were in another room. The niece, in her cross-examination, deposed that the mother of the appellant was in the house. It was, however, made clear in the examination-in-chief itself, that the television was in the backside room. The niece went to a different room to find out the grand-child of the appellant, however, he was not there. Thereafter, upon hearing the noise of television, she went to the backside room and at that time, she saw the incident. It is to be noted that it was noon time and noise of television was there.

21] The appellant has filed his written statement under Section 313 of the Code of Criminal Procedure at Exhibit 12. In the said statement, he has clarified that he has three sons who were residing separate by division of the rooms. He

himself used to reside in a single room where, his cot, the television set and necessary cooking ware etc. were there. His mother used to reside together with him. In the rest of the rooms, his three sons along with their family members used to reside separately. Further, according to the appellant, all of them, during the relevant period, were separate in the estate also after the division in the property and they used to cultivate their lands independently. If all these facts are taken into consideration, then the so called presence of family members in another rooms, would not make any difference. In the situation, the television was being played in a separate room of the present appellant while he was indulging in the activities charged.

22] This takes us to find out as to whether, there was any inconsistency regarding the period and time of the incident. The complainant and his wife

stated that the niece and the victim told the time of the incident as 3:30 pm. PW 4 – niece, in her cross-examination, deposed that it might have been about 5:00 pm. to 5:30 pm. at that time. Further, this witness as well as the elder victim have admitted that the school time was 10:00 am. to 4:00 pm. and interval time was between 1:00 pm. and 2:00 pm. In reexamination, however, the niece deposed that in the months of March and April, the school time was between 9:00 am. and 12:00 noon.

23] Considering the age of the elder victim of seven years, the age of the niece of thirteen years and considering their rural background and that they are from the family of agricultural labours, the difference of two hours cannot be said to be that much material to suspect the prosecution witnesses.

24] As regards the probability of the defence version, it is to be noted that the wife of the complainant admitted that sometimes her husband used to go for labour work in the field of the appellant and that both of them were in relation. Besides this, all other suggestions were denied and there is no material on record to probabalise further defence.

25] As regards the inability of the appellant to sit cross-legged, the defence witness Dr.Satyawan Shinde has deposed that on 23rd September, 2010, he had operated the appellant for inter-procantric fracture by putting nail and screw. The appellant, therefore, used to walk with the help of a walker for 2-3 months. According to him, due to said fracture, there may be problem in sitting cross-legged. It has come in his cross-examination,

that he did not bring any case papers of the appellant while he was deposing in the court on 30th September, 2014. Therefore, on the basis of his memory, he has deposed about the same. Further, we are not required to go into the details as to whether, at the time of the incident, the appellant was sitting cross-legged or was simply sitting.

. In my view, the prosecution has proved it's case beyond the reasonable doubt in that regard.

26] As regards the sentence awarded by learned Special Judge, it would be seen that learned Special Judge has awarded minimum sentences provided in the POCSO Act as well as Indian Penal Code. In the circumstances, no interference is warranted in the judgment of learned Special Judge.

27] In the result, the following order :-

a] The appeal is hereby dismissed.

b] Since the appellant is an under-trial prisoner, he shall continue to serve the sentences as ordered by learned Special Judge, Osmanabad.

[M.T. JOSHI, J.]

kbp