

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.248 OF 2014

YOGESH ARJUN MARAL)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Shri Vikas Shivarkar, Advocate for the Appellant.

Shri Deepak Thakre, APP for the Respondent - State.

CORAM : ABHAY M. THIPSAY, J.

DATE : 16th SEPTEMBER 2015.

ORAL JUDGMENT :

1 Aggrieved by the judgment and order dated 28th February 2014 delivered by the Special court constituted under Section 28 of the Protection of Children from Sexual Offences Act, 2012, (POCSO Act) convicting the appellant of an offence punishable under Section 8 of the POCSO Act and sentencing him

to suffer Rigorous Imprisonment for 3 years and to pay a fine of Rs.2,000/-, the appellant has approached this court by filing the present appeal.

2 The case of the prosecution was that the appellant had committed sexual assault upon the minor daughter of the First Informant Rupali Baba Gholap (PW2). The story is that the appellant and Rupali reside in the same building. On 6th May 2013, Sakshi (PW1), the minor daughter of Smt.Rupali (PW2), went to the house of the accused to play with other children who had assembled there. The appellant was alone in the house. The appellant managed to drive the other children out and closed the curtains of the window. He then removed the underwear of Sakshi and moved his hand on her private part. The girl (Sakshi) cried and ran out of the house. She went to her mother Rupali (PW2), who was, by chance, already calling her at that time. Sakshi narrated the incident to Rupali. Rupali telephonically contacted her husband Baba Gholap (PW3) and called him home. When he came, Rupali narrated to him what

had happened. Baba Gholap then went to the police station along with Sakshi. A.P.I.Jambure, posted at Sahakar Nagar Police Station at the material time, registered the report lodged by Baba Gholap, treating the same as the First Information Report (FIR). Investigation was entrusted to Smt.Shailaja Swaroopkumar Jankar, P.S.I. (PW4). The appellant was arrested on the same day. After investigation was carried out, charge-sheet came to be filed against the appellant.

3 During the trial, the prosecution examined the aforesaid four witnesses. Believing their evidence, the learned trial Judge convicted and sentenced the appellant as aforesaid.

4 I have heard Shri Vikas Shivarkar, the learned counsel for the appellant. I have heard Shri Deepak Thakre, the learned APP for the State. I have gone through the entire evidence adduced during the trial. I have carefully gone through the impugned judgment.

5 In her evidence, Sakshi (PW1) has narrated the incident clearly. She has described the appellant as the father of her friend Mugdha. That, the appellant is the father of Mugdha is not in dispute and the reference to Mugdha's father made by Sakshi (PW1) is a reference to the appellant, is undisputed. Sakshi has stated that though there were other children in the house of the appellant, he made them sit in the outside room where television was kept on. Sakshi was taken to some other room, whereafter, the appellant moved his hand on her body and removed her nicker. He also moved his hand on the private part of Sakshi. Sakshi got frightened and asked him to leave her. When the appellant said that he was her uncle, Sakshi said that whether uncle would do such things. At that time, Sakshi's mother gave her a call from outside. Sakshi went out, hugged her mother and narrated the incident to her. That, on hearing about the same, her mother started crying and had a hysteric attack.

6 Sakshi was extensively cross-examined. However, there is absolutely nothing in her cross-examination which would discredit her version.

7 The evidence of Rupali (PW2) and Baba Gholap (PW3) is also consistent with the story of Sakshi (PW1). Rupali speaks about Sakshi coming out of the house of the appellant crying and narrating the incident to her. Rupali has stated in her evidence what Sakshi told her and this is consistent with what Sakshi has stated before the court. Baba Gholap (PW3) also states about what Sakshi told him when he came home. His version is not only consistent with the evidence of Sakshi (PW1) and Rupali (PW2), but is also consistent with the FIR.

8 The evidence of none of these witnesses has been challenged successfully in the cross-examination. A suggestion has been given to them that actually no such incident had taken place, which suggestion was denied by the witnesses.

9 In the evidence of P.S.I. Shailaja Swaroopkumar Jankar (PW4), it was asked to her that in the medical examination of Sakshi, nothing incriminating was found, to which she agreed.

However, that is absolutely immaterial, in my opinion. It has been nobody's case that any injury was caused to Sakshi or that there were any marks on her body as a result of the incident.

10 Shri Shivarkar, the learned counsel for the appellant, raised only one contention, viz., that the statement of Sakshi was not at all recorded in the course of investigation. He pointed out that, according to Sakshi, her statement was recorded by the police only once. This statement was, admittedly, recorded after the charge-sheet was filed. P.S.I. Shailaja (PW4) has admitted the same and has also agreed that it was a mistake not to have recorded the statement of Sakshi before filing of the charge-sheet.

11 Indeed, this was a weakness in the investigation. It is quite surprising that the Investigating Officer should make such a mistake viz., of not recording the statement of the victim herself and filing a charge-sheet against the appellant without such statement. However, in the facts and circumstances of the case, and after carefully considering the evidence of Sakshi, it does not

appear that the prosecution case should be disbelieved or doubted on that account.

12 The learned trial Judge has also considered this aspect of the matter. The learned trial Judge has observed that Sakshi (PW1) was taken to Sasoon hospital on 8th May 2013, and in the case papers, the history noted by the doctor described the incident in details. The learned Judge has concluded that the allegations were already leveled by Sakshi against the appellant, and that, therefore, the delayed recording of her statement would not create a disbelief in the truth of the prosecution case.

13 After carefully considering the matter, this court is also of the same opinion. The evidence of Rupali (PW2) and Baba Gholap (PW3) does not suffer from any infirmity, and in the cross-examination of these witnesses, no challenge to that part of their evidence, which speaks about what Sakshi (PW1) told them, has been given. The matter was immediately reported to the police. It is not possible to hold that Rupali (PW2) and Baba Gholap

(PW3) have invented an imaginary story about their daughter having been sexually assaulted by the appellant. In his examination under Section 313 of the Code of Criminal Procedure (Code), the appellant has merely denied the incident but has not even suggested a possible motive on the part of Rupali (PW2) and / or Baba Gholap (PW3) to falsely implicate him. It is not possible to hold that without the disclosure of the incident by Sakshi (PW1), Rupali and Baba Gholap would report the matter to the police alleging that the appellant had committed sexual assault. Moreover, it appears that Sakshi was taken to the police station. In all probability, she was questioned and enquiries were made with her, but apparently, her statement was not recorded due to pure inadvertence. It, however, may be observed that the terms of sub-section (3) of Section 161 and sub-section (1) of Section 162 of the Code clearly indicate that there is no illegality if the Police Officer making investigation does not choose to reduce the statement made to him by a person during investigation, to writing. Thus, there is no question of an illegality, but only of propriety.

14 The factors such as *the consistency between the evidence of Sakshi (PW1), Rupali (PW2) and Baba Gholap (PW3), the immediate reporting of the matter to the police specifically leveling an accusation against the appellant, the absence of any motive on the part of Rupali and / or Baba Gholap to falsely implicate the appellant, and the failure of the appellant to give any explanation as to why Sakshi, Rupali, and Baba Gholap, all were falsely implicating him*, cumulatively leave, no manner of doubt that the evidence of Sakshi, Rupali and Baba Gholap can safely be accepted.

15 While appreciating evidence in cases under the POCSO Act, the presumption contained in Section 29 thereof, needs to be kept in mind. The terms of the said section are very wide and a plain reading thereof indicates the said provision to be contrary to the basic and normal principles of criminal jurisprudence. The ambit and scope of the presumption enacted by Section 29 and its true meaning would certainly need a detailed discussion in an appropriate case, but the same is quite unnecessary in the present one. What,

however, needs to be observed for the present is that, the said presumption would add strength to the prosecution evidence. When, in the instant case, the victim has stated before the court unequivocally about the appellant having committed the act, the said presumption would undoubtedly add strength to her evidence.

16 In this case, the conclusion arrived at by the learned trial Judge that the case had been proved against the appellant beyond reasonable doubt is proper, legal, and in accordance with law. The appreciation of evidence, as done by the learned trial Judge, does not suffer from any error or infirmity. The learned Judge has awarded only the minimum punishment that has been prescribed for the offence punishable under Section 8. As such, the sentencing also does not warrant any interference.

17 The appeal is dismissed.

(ABHAY M. THIPSAY, J.)

CERTIFICATE

**Certified to be true and correct copy of the original
signed Judgment /Order.**