

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.571 OF 2015

Chutukumar Kabarar Trivedi
aged 22 years, Indian Inhabitant
R/o. Mahatma Gandhi Nagar
Zopadpatti, Near Railway Line,
Panchsheel Nagar, Sion Koliwada,
Sion, Mumbai

..Appellant

Versus

The State of Maharashtra
(at the instance of Wadala
T.T. Police Station, vide
C.R. No.112 of 2013)

..Respondent

....
Ms. Anjali Patil a/w. Arun Rajput, Advocate for the Applicant.
Mr. A.R. Patil, APP, for the State.
....

CORAM : A. R. JOSHI, J.

DATE : 23rd JULY, 2015

ORAL JUDGMENT :

1. Heard rival submissions on this appeal preferred by the appellant / original accused challenging his conviction for the offences punishable under Sections 354, 354B, 376(2)(i) of IPC. For the offence punishable under Section 354 of IPC, the

appellant is sentenced to suffer RI for three years and to pay fine of Rs.1000. For the offence punishable under Section 354B of IPC, he is sentenced to suffer RI for five years and to pay fine of Rs.2000/-. For the offence punishable under Section 376(2)(i) of IPC, he is sentenced to suffer RI for ten years, which is the minimum awarded for the said section and fine of Rs.5000/-.

2. When the application for bail during pendency of the appeal was taken before this Court earlier, the substantive evidence of the prosecution witnesses was dealt with and that time it was ascertained that instead of deciding the application for bail it would be proper in the interest of justice to dispose of the entire appeal by putting it for final hearing and as such the matter is taken today for final hearing.

3. The case of the prosecution in nutshell is that the appellant/accused was residing in the neighbourhood of the family of the complainant. The complainant is the mother of the victim girl. Said girl was then aged about 4 to 5 years when the incident happened in the afternoon of 23.4.2013. The victim girl along with her another sister elder than her and her parents were residing in the slum area in small hutment. The accused

was also residing in the same locality and was in fact well known to the family of the complainant. Present appellant was being called as “Chhotu uncle” by the children in the locality and also by the victim girl (PW-1). On the relevant afternoon the appellant called the victim girl in his hut and asked her to perform some dance on the music which was being played in his hut. The girl apparently then aged about 4 to 5 years started dancing. That time according to the case of prosecution the appellant removed her petticoat / frock and made her to dance only on the undergarments. Thereafter he asked the girl to take his penis in her mouth. The small child did as per the instructions and in fact felt vomiting sensation and as such started crying. On this the appellant took the child to her house. In fact this is the incident according to the case of the prosecution occurred on that afternoon. Thereafter on that night apparently nothing happened and on the next day early hours the small girl child woke up from the sleep. It happened on the early hours of 24.4.2013. That time the child felt like vomiting sensation and her mother i.e. PW-2 complainant took her to the WC and after the vomiting, gave her some medicine in the morning. Thereafter in the evening of 24.4.2013 the

complaint was lodged with the police. The complaint was lodged by PW-2 mother of the victim girl as what she revealed from the child at the early hours of 24.4.2013. On the strength of the complaint the offence was registered on that night of 24.4.2013 and immediately within two hours the present appellant was put under arrest.

4. During the investigation, the spot panchnama was conducted. It was apparently the house of the appellant but in fact nothing incriminating was found. But it is also a factual position that there was no mobile or no any sound playing instrument found in the hutment of the appellant. This is significant inasmuch the case of the prosecution is that the victim girl was asked to dance on the music which was being played in the hut of the appellant. The victim girl and the appellant were sent for medical examination. The statements of the witnesses were recorded and after completion of investigation, the chargesheet was filed. The appellant accused was convicted for the offences, as detailed earlier.

5. During the trial there were total five witnesses examined. PW-1 is the victim girl. At the time of recording of

evidence her age was about six years. PW-2 is the mother of the victim girl. PW-3 is then about 10 to 11 years old girl-friend of the PW-1. Last two prosecution witnesses are the investigating officers – one of them registered the FIR and other carried out the investigation and filed the charge-sheet. The only important evidence is that of PW-1, PW-2 and PW-3. In the present case it is significant that no doctor is examined as the medical examination reports of the girl and also of the appellant were admitted by the defence. It was apparently so as the medical examination report of the girl was only to the effect ascertaining her age by way of different clinical and X-ray tests. Her age is ascertained as 4 to 5 years. Also the medical certificate of the appellant/accused was not of much significance inasmuch as the case of the prosecution is not of actual carnal intercourse, but, it was allegedly putting the penis of the appellant in the mouth of the child. The medical examination of both was conducted after two days of the incident and of course their could not have been any material available in the medical examination of the girl or for that matter of the appellant so far as the actual commission of the crime. Of course, the clothes of the appellant were taken charge of and were sent for chemical

analysis but the report of the CA is not finding of any seminal stains on the clothes.

6. Considering the above specific circumstances of the commission of the offence the only substantive evidence which is required to be analyzed is that of PW-1, PW-2 and PW-3 as mentioned earlier. So far as the PW-1 is concerned, the age of the girl is of very crucial significance. During the incident she was 4 to 5 years of age and when she gave evidence before the Court which is practically in the question and answer format, she was of 6 years age. Various answers are given by her during her examination-in-chief and also in the cross-examination. In the examination-in-chief she identified the appellant/accused sitting in the Court then, as Chotu uncle. She also apparently narrated that he took her to his hut and asked her to dance on some music being played. She also specifically mentioned regarding the actual incident and then also answered that she started crying and then the appellant took her to her hut. During the cross-examination certain questions were asked to the said tender age child, of course taking all the precautions of not being hostile to the child while putting her to the cross-

examination. But it is brought on record that the child had identified the appellant as told by her parents. The child also answered that Chotu uncle was known to her as staying in the same locality. At one point of time, when a question was asked to the child whatever she has`deposed before court was not true but the child answered that 'no it was true' and she has stated so correctly. But again on the next question when the question was asked in a different format the child had answered and according to the defence that answer is in favour of the defence. The actual questions and answers which were recorded by the trial Court are reproduced in order to have the proper appreciation of the answers given by the child :

Que. Is it true that whatever incident told by you was not true?

Ans. No it is true.

Que. Is it correct that no such incident as told by you took place?

Ans. Yes.

. Still one more question and answer was highlighted by the learned Counsel for the appellant during the arguments and the same is as under :

Que.Is it true that whatever you deposed on the last date was stated on the say of your

mother?

Ans. Yes.

7. In fact the answers given by a small child are required to be considered in the light of other material available on record and only mere answers given by her either alleging any conduct on the part of the appellant or giving the answers supporting the defence cannot be construed as sufficient to hold the conviction. This is more so when on the face of it the offence is of very heinous nature if accepted as established and also attracting minimum punishment of 10 years. There is no scope of lesser sentence for the offence punishable under Section 376(2)(i) if established and when the new definition of the offence of rape is accepted as mentioned in Section 375(a) of IPC.

8. In view of the above state of affairs of the child witness evidence, now the substantive evidence of the complainant PW-2 is required to be construed in order to ascertain whether the events had happened in the manner as reported to the police by the complainant. In the substantive evidence of PW-2 she had stated that on the day of the incident i.e. on 23.4.2013 itself in the afternoon her daughter the victim child came crying and

she had a vomit in the house. Immediately she was taken to the nearest dispensary and after administering some medication the child was taken to the police station and the complaint was lodged. It is the specific evidence of PW-2 that on the day of the incident the complaint was lodged with the police. She is silent on the aspect as to she learnt entire episode at the early hours of the next day when the child woke up from the sleep and felt like vomiting sensation. All that material which was mentioned in the FIR was brought on record as and by way of the omission and proved through the investigating officer during the trial. As such there is a discrepancy in the actual case of the prosecution as portrayed by lodging the FIR and what is told before the Court by PW-2 complainant. On this aspect the learned APP for the State stated that the said complainant is an illiterate lady and had studied upto second standard and as such required to be given an allowance while narrating the incident before the Court. Still if such argument is considered the question remains that according to the substantive evidence of the small child (PW-1) there was nothing like disclosure to her mother immediately in the afternoon of 23.4.2013 and according to PW-2 mother the child came crying on the same afternoon and then

the complaint was lodged with the police. However, it is a factual position and also fortified by the substantive evidence of PW-4 and PW-5, the investigating officers, that the complaint was lodged on the next day night and prior to 7 p.m. of 24.4.2013 there was no information to the police regarding the alleged incident taken place in the afternoon of 23.4.2013. As such, in the opinion of this Court this variance in the actual incident and narration to the police is a mitigating circumstance to the case of prosecution and apparently this has been overlooked by the trial Court.

9. Apart from the above, there is another check in order to establish the authenticity or correctness of the case of the prosecution and that is by way of substantive evidence of PW-3 the friend of the small child. Said PW-3 was then about 10 to 11 years of age rather matured in age than that of the child. Entire substantive evidence of PW-3 goes to suggest that in that afternoon of 23.4.2013 she was playing with her friend by name Pappi and then they went to the house of Chotu uncle and they saw the victim girl dancing at the house of said Chotu uncle, without any clothes. This PW-3 was also of tender age of 11

years and most of her evidence is in question and answer and which is reproduced hereunder for the sake of ready reference.

Q.12. Do you know Chhotu uncle ?

Ans. Yes.

Q.13. At which place Chhotu uncle resides ?

Ans. He stays on the “mala” of the house of Murthi Anna and there are two three houses in between my house and Murthi Anna's house.

Q.14. What did you see on the date of incident on 23.04.2013 ?

Ans. On that day myself and my mummy were returning home from temple. On that day we had holiday. Then myself, Chanchal and our another friend Pappi went to the house of Chhotu uncle for giving him prasad. When we went there music was being played in the house of Chhotu uncle and Geeta was dancing without any clothes.

Q.15. Who was in the house of Chhotu uncle at that time ?

Ans. No one except Chhotu and Geeta were in the house.

Q. 16. What did you do thereafter ?

Ans. We asked Geeta to come with us for playing. But she did not immediately come and so we went and started playing and thereafter Geeta came.

Q. 17. How was the condition of the Geeta when she came down stairs ?

Ans. Geeta was wearing only a nicker.

Q. 18. Did she play with you ?

Ans. No. She went home.

Q. 19. Had you gone to police station ?

Ans. No.

Q. 20. Did you tell the police what you saw in the house of Chhotu uncle ?

Ans. No.

10. The effect of the above substantive evidence of PW-3 goes to show that victim child was dancing in the house of the appellant and she was not having any clothes. According to PW-3 the music was being played in that house. After PW-3 and her another friend called the victim girl she had not immediately came out and continued dancing and thereafter came out and thereafter the girl went home alone. Significantly enough there is nothing like the victim girl came out of the house of the appellant crying and the appellant taking her to her home. During the cross-examination it is brought on record that it was not unusual that in the said area and locality the small children roam here and there with very less clothes on their persons and at times only undergarments or nicker. Apparently, this is quite possible considering the age of the small child i.e. 4 to 5 years that the child may move around having only a pant on her person.

11. During the arguments, learned APP for the State submitted three points. Firstly he mentioned that PW-2 complainant was illiterate lady and as such she could not have given the proper account of the events known to her from the child. Secondly it is submitted that the appellant was absconding as is stated by police officer PW-4. However the factual position is that the offence was registered at about 9 p.m. or so on 24.4.2013 and the appellant/accused was arrested at about 11 p.m. just within two hours or so from the lodging of the FIR. For this small period it can hardly be said that the accused was absconding. Still the abscondance of the accused by itself cannot be taken as establishment of his guilt. Only it might be relevant to throw light on his conduct. Thirdly, it is argued on behalf of the State that mere tutoring of a child was in fact natural considering the age of small child i.e. at the time of incident about 4 to 5 years and at the time of giving evidence about 6 years. By pointing out this it is submitted that father and mother are bound to tell so many things to the child when the child is asked to give evidence in the Court. Of course in appreciating the evidence of a child witness the Court must be on its guard. In other words it is always not possible to ascertain

the truthfulness or otherwise of a child witness as the evidence of a child is vulnerable to many circumstances. Unless there is other cognate material to come to the establishment of the offence and that also in such a case of grave offence which carries minimum punishment of ten years of imprisonment, there must be much care and caution to be taken while analyzing the evidence brought before the Court. In that view of the matter, in the opinion of this Court, a doubt has been created as to whether the accused person had actually committed an offence or he has been falsely implicated. This is more so when the probable defence on behalf of the accused is put forth to PW-2 the complainant that the appellant had given a loan of Rs.10000/- to the father of the child and there was dispute over the said amount as the money was not being repaid. On this aspect, learned APP further argued that a person may not put the character of his child to stake while refusing to pay the amount of loan if accepted. However, in the matter it is to be ascertained whether the prosecution has established its case by way of the material available on record and in that event in the considered view of this Court the material brought before the trial Court is not of that standard to

convict the accused for the offences charged and that also mainly for the offence punishable under Section 376(2)(i) of IPC which carry the minimum imprisonment of ten years. In the result, present appeal succeeds and the same is accordingly disposed. Hence the order :

:: O R D E R ::

- i. Criminal Appeal No.571 of 2015 is allowed;
- ii. The impugned judgment and order passed by Designated Court under Protection of Children from Sexual Offences Act, 2012 for Greater Bombay in Sessions Case No.434 of 2013 dated 18th April, 2015 is quashed and set aside. The appellant / accused is acquitted of the offence punishable under Sections 354, 354(B), 376(2)(i) of IPC;
- iii. The appellant / accused be released from jail custody, if not required in any other case;
- iv. The fine amount if already paid, the same shall be returned back to the appellant;
- v. Criminal Appeal is disposed of accordingly.

(A. R. JOSHI, J.)