

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 294 OF 2016

Nitin s/o Dnyanoba Maske,
Age 30 years, Occ. Labour,
R/o. Sathe Nagar, Parli (V.)
Tq. Parli (V.), Dist. Beed.

.... **Appellant**
(Orig. Accused).

VERSUS.

The State of Maharashtra,
Through Police Station Officer,
Parli (V) City Police Station,
Tq. Parli (V), Dist. Beed.

... **Respondent**
(Orig. Complainant)

...

Advocate for Applicant : Mr. S. B. Solanke.
APP for Respondent : Mr. K.D. Munde.

CORAM : K. L. WADANE, J.
DATE : 15th OCTOBER, 2018.

JUDGMENT :

1. The appellant preferred this appeal against his conviction recorded by the Special Judge in Special (POSCO) Case No. 12 of 2015 for the offence punishable under section 354-A of the Indian Penal Code and sentenced to suffer rigorous imprisonment for two years and to pay fine of Rs. 500/-, in default to suffer simple imprisonment for seven days. He is further convicted for the offence punishable under section 8 of the Protection of Children from Sexual offences Act, 2012 and sentenced to suffer rigorous imprisonment for three years and to

pay fine of Rs. 1000/-, in default to suffer simple imprisonment for ten days. He is also convicted for the offence punishable under section 10 of the Protection of Children from Sexual offences Act, 2012 and sentenced to suffer rigorous imprisonment for five years and to pay fine of Rs. 2000/-, in default to suffer simple imprisonment for fifteen days. The sentences imposed shall run concurrently. The appellant/accused has been acquitted from the charge punishable under section 323 of the Indian Penal Code.

2. Heard Mr. Solanke, learned counsel for appellant and Mr. Munde, learned APP for the respondent/State.

3. P.W. 3 victim lodged a complaint to the police station Parali (Vaijnath) on 02.03.2015 alleging that her native place is Sarkoli Tq. Pandharpur. Name of her father is Datta Pawar and name of her mother is Shamal Pawar. Her father Datta Pawar convicted in certain offences therefore he was sent to jail, thereafter, mother Shamal came to Parali (V) and started residing with Nitin Maske i.e. the appellant/accused. When the victim was residing along with her other sisters at Jamkhed, her mother Shamal and appellant/accused came there and brought them to their house at Parali (V). The appellant/accused was maintaining the victim just like a father.

4. Fifteen days before the first information report, the appellant/accused picked-up a quarrel with Shamal and pressed the breast of the victim. Her mother Shamal tried to give understanding to the appellant/accused but he was not in a position to listen and was insisting to slip with the victim.

5. On the basis of the first information report offences came to be registered against the appellant for the offences punishable under section 354-A, 323 of the Indian Penal Code and under section 8 and 10 of the Protection of Children from Sexual Offences Act, 2012.

6. After registration of the crime immediately the appellant/accused was arrested. P.W. 6 Ramesh Jadhavar visited the spot and prepared spot panchnama, recorded the statement of witness Nisha i.e. the sister of victim. The victim as well as Nisha were sent for medical examination. P.W. 7 Ajit Vispute, police inspector, recorded the statement of victim.

7. In order to establish the guilt of the accused, the prosecution has examined in all seven witnesses. P.W. 1 Bhima Gaikwad, panch witness, to prove the contents of the spot panchnama, P.W. 2 Kumar Adode, panch witness of the spot panchnama, P.W. 3 victim, P.W. 4 Nisha, sister of the victim, P.W. 5 Dr. Vishal Patil, medical officer, P.W. 6

Ramesh Jadhavar and P.W. 7 Ajit Vispute, investigating officers. After recording the evidence of witnesses, statement of accused was recorded under section 313 of the Code of Criminal Procedure. The accused examined defence witness Shamal Maske i.e. the mother of the victim.

8. Besides the oral evidence of aforesaid witness, the prosecution has relied upon the case papers Exh. 31 and 32, the age certificate of victim at Exh. 33.

9. Learned counsel for appellant during the course of arguments submitted that oral evidence adduced on behalf of the prosecution is not free from infirmities, therefore, it cannot be believed. Learned counsel for appellant further submitted that there is no satisfactory evidence on record to show that the victim was below age of 18 years at the relevant time, within the definition of the '*child*' as per section 2 sub-section (d) of the Protection of Children from Sexual Offences Act, 2012. Learned counsel for appellant further submitted that the doctor who examined on the point of age of the victim, is not an expert to read the x-ray and the opinion about the age of the victim was based upon the radiological findings.

10. So looking to the allegations against the appellant it

appears that he was custodian of PW 3 victim and PW 4 Nisha at the relevant time and further it reveals from record that the D.W. 1 Shamal appears to be married with the appellant/accused therefore she is intending to reside with him in future. It also reveals from the record that the D.W. 1 Shamal left her native place because of the conviction of her first husband and after sending him in the jail. It also reveals that initially D.W. 1 Shamal alone came to Parali (V) and started residing with appellant/accused and all the five daughters of D.W. 1 Shamal were residing at native place Sarkoli. Subsequently the victim along with other sisters shifted their residence to Jamkhed and subsequently appellant/accused and D.W. 1 Shamal brought the victim and P.W. 4 Nisha to the house of appellant/accused where they were residing under the care and custody of appellant. So looking to the circumstances, I do not find any reason for P.W. 3 Victim and P.W. 4 Nisha to depose falsely against their custodian as a father.

11. To establish the offence, the evidence of P.W. 3 victim and P.W. 4 Nisha is relevant. On perusal of the same it appears that P.W. 3 victim deposed as follows:

"My mummy and Nitin Maske came at Jamkhed prior to three years back. They took myself, Vaishali and Nisha to Parli Vajinath at his house. Nitin used to ask her mummy to allow him to sleep with me. My mother used to oppose him but he

used to beat her and her mother. He used to press her breast and pull her towards him. On 2.3.2015 myself and mother visited the police station Parli to lodge complaint".

12. Likewise, from the evidence of P.W. 4 Nisha it reveals that her evidence was recorded in question-answer form, because at the time of recording her evidence she was aged about 8 years. The learned Additional Sessions Judge verified, whether the witness is capable to understand the question and after verifying this aspect he recorded the oral evidence of P.W. 4 Nisha in question-answer form. The relevant questions are at Sr. No. 4, 5, 6 and 7 are :

"(4) Before this where you were residing ?

Ans : Before this I was residing at Parli Vajinath.

(5) Who were residing at Parli Vajinath ?

Ans : I myself, Amrapali, Nitin, my mother Shamal and his two sons were residing at Parli Vajinath.

(6) What happened at Parli in your house ?

Ans : Accused Nitin used to beat me and my mother. He used to come at house by drinking and he used to beat my mother and sister. He used to press breast of Amrapali and he used to ask her to allow him to sleep over her.

(7) What he was asking to you ?

Ans : He used to ask me to take his penis in my mouth.

13. From the aforesaid questions and answers it is crystal clear that appellant/accused used to press the breast of victim. The appellant/accused used to ask the victim to allow him to slip over her. Since P.W. 3 victim and P.W. 4 Nisha were residing together with their mother Shamal and appellant, their presence in the house is but natural and P.W. 4 Nisha also deposed in clear terms and the oral evidence of this witness supports the oral version of P.W. 3 victim and it is in the form of corroboration. Minor daughters of D.W. 1 Shamal have no reason to depose false against the appellant/accused. They were in the custody of appellant/accused. Therefore, by any stretch of imagination I do not find any reason for the P.W. 3 victim and P.W. 4 to depose false against their custodian/step father.

14. Next aspect argued by the learned counsel for the appellant is about the age of the victim. According to learned counsel, the evidence on record to prove the age of the victim is not free from infirmity and not sufficient to come to the conclusion that the victim was below age of 18 years within the meaning of 'child' as defined in the Protection of Children from Sexual Offences Act. In support of his contention learned counsel for appellant has relied upon the following cases :

- (i) Criminal Appeal No. 43/2018 (Prashant Vs. State of Maharashtra)

- (ii) Criminal Appeal No. 330 of 2015 (John V/s. State of Maharashtra)
- (iii) Criminal Appeal No. 20 of 2016 (Kiran Vs. State of Maharashtra)

15. I have gone through the facts and observations of the above cases however, those are inapplicable to the facts of present case simple because the present appellant/accused has not challenged the age of the victim. P.W. 3 victim deposed on oath that her age was 14 years (at the time of deposition). This evidence of the victim on the point of her age has not been challenged by the appellant. Because there is no suggestion during the cross-examination that at the relevant time of the incident the victim was above 18 years old.

16. Besides the evidence of the victim about the age, there is additional evidence that is the evidence of P.W. 5 Dr. Vishal at Exh. 29 who deposed that he examined the victim on 3.3.2015. Initially he prepared the case papers and referred the victim to the Radiology Department for determination of her age and after receipt of the findings of the radiological examination, doctor formed his opinion about the age of the victim. On the basis of the findings recorded by the Radiologist he issued age certificate Exh. 33 and in the opinion of P.W. 5 Dr. Patil, at the time of examination of victim she was aged between 12 to 14 years. Exh. 32 is the case papers. From the same it

appears that the victim was referred to Radiology Department and there is endorsement of taking x-ray of elbow and wrist and after perusal of the relevant record Dr. Patil has issued the medical certificate Exh. 33 and opined that the age of the victim is between 12 to 14 years. Not only this, the defence witness Shamal herself admitted this fact in the cross-examination which reads as follows :

"at the time of incident the age of the victim was 14 years and age of Nisha was 9 years."

17. In view of the above and upon scrutiny and re-appreciation of evidence, I do not find any reason to disbelieve the evidence of prosecution on the point of sexual assault and the age of the victim.

18. Coming to the next aspect about the oral evidence of defence witness Shamal at Exh. 47 it appears that she deposed in favour of the appellant/accused. Her evidence is not acceptable simply because from the certain admission given by this witness it reveals that she married with the appellant and there was love affair between her and appellant. It also reveals from further cross-examination that this witness begotten one daughter and one son from accused Nitin. She further admitted that she is intending to live with appellant/accused as husband and wife in future. This is the reason for which this witness is not supporting the case of prosecution. Though her statement was

recorded by the police, she entered into witness box being a defence witness to support the defence. However for the simple reason that the defence witness married with the accused having one son and a daughter begotten from the appellant/accused and in future she is intending to reside with the appellant, therefore, it appears to this Court that these are the reasons for which she has not supported the case of prosecution and on the contrary supported the defence of the accused.

19. For the reasons stated above, the oral evidence of P.W. 3 victim and P.W. 4 Nisha is quite clear and unambiguous about the sexual assault made on the victim as contemplated and defined under section 9 sub-clause (n) punishable under section 10 of the Protection of Children from Sexual Offences Act.

20. In view of the above, there is no substance in the appeal therefore, I do not find any reason to disturb the findings recorded by the Trial Court. Therefore, the Criminal Appeal is liable to be dismissed, accordingly it is dismissed.

21. Criminal Appeal is disposed of.

(K. L. WADANE, J.)

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