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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL No. 668 OF 1998

The State of Maharashtra

... Appellant
(Original Complainant)

Vs.

Popat alias Balu Buva Jadhav
Age about 44 years, Occu. -
Service, R/a. Walchandnagar,
Taluka Indapur, District Pune

... Respondents
(Original Accused)

Mrs. M. M. Deshmukh, APP for the Appellant - State.

Mrs. Racheeta R. Dhuru, appointed advocate for the
Respondent.

**CORAM : INDRAJIT MAHANTY, &
PRAKASH D. NAIK, JJ.**

JUDGMENT RESERVED ON : NOVEMBER 24, 2018

JUDGMENT PRONOUNCED ON : DECEMBER 3, 2018

JUDGMENT [Per : INDRAJIT MAHANTY, J.]

1. By the present appeal filed under Section 378(1) of
the Code of Criminal Procedure, 1973, Appellant – State is

challenging the judgment and order, of acquittal of the accused-respondent of the offences punishable under S. 376, 506 of the Indian Penal Code, passed by the learned Additional Sessions Judge, Baramati, at Baramati in Sessions Case No. 28 of 1993, dated 4.4.1998

2. At the very outset, it needs to be recorded that the High Court while exercising powers under S. 378(1) Cr. P.C. and before reaching its conclusion upon the facts, is required to give proper consideration to such matters, such as : (i) the view of the trial court as to the credibility of the witnesses; (ii) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that they have been acquitted at trial; (iii) the right of the accused to the benefit of any doubt. [**Sangppa Vs. State of Karnataka**¹ , paragraph 11 thereof],

3. The prosecution case in brief is as under:

¹ (2010) 3 SCC 686

(i) PW 4 - victim, aged about 7 years, at the time of occurrence of crime was living with her grand-mother (PW 3) Adika and was studying in 2nd Standard at the local village school. The parents of said victim were residing separately. On the date of incident i.e. 6th January, 1993 victim came back from the school and after taking meal, went for playing near the school where she was playing on sliding. At that time, a person wearing black pant, white shirt and black cap came near her and promised her to give chalk stick and took her with him to the balcony of cinema theater, and laid her down and thereafter he removed her under garments and had committed sexual intercourse with the prosecutrix. It is further alleged that the said boy threatened to kill her if she discloses the matter to anybody. After the incident, victim went back to her home.

(ii) On the same day, victim did not disclose anything to her grand-mother PW 3 Adika, but on the next day morning i.e. on 7.1.1993 victim complained of pain in her private parts to

her grand-mother. Thereafter her grand-mother inquired from the victim as to the cause of such pain and victim disclosed the entire incident to her grand-mother PW 3 Adika. It has further come in the evidence that victim was taken to a local company hospital at Walchand Nagar on 7.1.1993, where she was prescribed certain medication. Since victim did not get any relief from her pain, she was again taken to the said company hospital on 12.1.1993. At that time her grand-mother PW 3 Adika informed about the incident to Dr. Nevergi, who examined victim and after consulting with another doctor Dr. Kavishwar (PW 5) suggested her to lodge the complaint in the police station. In response PW 3 Adika stated that she could not lodge the complaint, as neither victim, nor she herself knew name of accused person at the relevant time.

(iii) Thereafter on 17th January, 1993 while PW 3 Adika was taking the victim (her grand daughter) to the school, it is stated that victim pointed out the accused Popat @ Balu Buva

Jadhav as the person, who had committed the sexual offence with her. PW 3 Adika called the accused to her home, where he is alleged to have admitted that though he had taken victim to the cinema but denied any sexual assault of victim. It is thereafter PW 3 Adika lodged a complaint (Exhibit 15).

(iv) Police took various steps in the matter, as also got victim / victim (PW4) medically examined at the government hospital viz. Sasoon General Hospital, Pune. After completion of investigation, charge-sheet was submitted in the Court of Judicial Magistrate, F.C. Indapur, and since the offence punishable under S. 376 of the Indian Penal Code was exclusively triable by the Court of Sessions, the learned Judicial Magistrate, F.C. Indapur committed the case to the Court of Sessions. Charges were framed for the offence punishable under S. 376 and 506 of I.P.C. against the accused-respondent, who pleaded not guilty and therefore, the trial was conducted.

4. On perusal of the judgment rendered by the

Additional Sessions Judge, Baramati dated 4.4.1998, we find that the trial court came to the conclusion that age of the prosecutrix was 7-8 years at the time of alleged occurrence of crime, which took place on 6th January, 1993 and she was studying in 2nd standard at the relevant time. He further came to the conclusion that PW 4 victim was residing with her grandmother PW 3 Adika. Further, learned trial court came to the conclusion that the defence of the accused that there was delay of 11 days in lodging the complaint, was not acceptable, and he found that the PW 3 Adika and the prosecutrix PW 4 victim have adequately explained the delay, and therefore, came to the conclusion that there does not appear any good ground to discard the version of PW 4 merely on the ground of delay.

5. Thereafter, the trial court after perusing evidence of victim and on recording the events that took place on the date of incident, concluded that it was unreasonable to think that PW 4 would think of any untrue story or would be able to spin a story

so as to say that one boy had taken her to balcony of cinema theatre promising to give chalk stick and committed sexual assault with her. PW 3 Adika, the grand-mother and none of the prosecution witnesses were also in a position to imagine any such story about the boy. The learned Additional Sessions Judge also came to the conclusion that such a story would not enter in the mind of either PW 4 victim or parents and grand-mother, and therefore, he came to the conclusion that there appears a ring of truth in her version about a boy, taking her to the balcony of the cinema theatre and had committed sexual assault with her.

6. PW 5 Dr. Akshay Kavishwar, who was examined on behalf of the prosecution, in his evidence stated that Dr. (Ms.) Nevargi had examined victim and she had found “redness” on the opening of the vagina, and she had doubt about the cause of redness on the opening of vagina of the victim. Consequently, she is said to have consulted PW 5 Dr. Akshaya Kavishwar, who

opined that “redness” on the opening of vagina “could be” on account of sexual assault. But it is a fact that PW 5 Dr. Kavishwar had not physically examined victim, and therefore, his statement is based upon observation of his colleague Dr. (Ms.) Nevargi. The case papers of the medical examination (Exhibit 19) do not support the prosecution inasmuch as, Dr. Kavishwar's statement could not be held to be conclusive since he has stated the same “could be” due to sexual assault and further since he had not carried out any physical examination of the victim.

7. The trial court took into consideration the medical report (Exhibit 123) of the victim, examined on 18th January, 1993 at Sasoon General Hospital, Pune, which states that, hymen was intact and there is “no evidence of sexual intercourse”. The learned trial court took a note of the fact that Dr. (Ms.) Gandhi and Archana Desulka are stated to have examined the victim at the government hospital. Therefore, the

medical evidence produced by the prosecution does not indicate any evidence of occurrence of sexual intercourse.

8. The trial court further considered the evidence of PW 4 victim regarding the “identity” of the accused. The victim claims to have pointed out the accused to her grand-mother PW 3 Adika, on 17th January, 1993 while going to school. While considering the aforesaid evidence, the trial court found it necessary to see as to whether the claim of PW 4 victim was worthy of credence. PW 3 Adika, and PW 2 Ashok, in their evidence have stated that all employees of cinema theatre had been shown to victim earlier, but, victim at that time had stated that none of them was the person, who had sexually assaulted her in the balcony of the cinema theatre. Therefore, the trial court concluded that evidence of PW 3 grand-mother Adika and uncle PW 2 Ashok clearly indicate that victim (PW 4) had not identified the accused, as the same person, who had committed the crime. It appears that only on the day following i.e. 17th

January, 1993, it is claimed that victim pointed to the accused-respondent as the perpetrator of the crime to PW 3. Due to the reasons noted hereinabove, the learned trial court came to the conclusion that, claim of victim of identification on 17th January, 1993 could not be relied upon and cannot be accepted.

9. Further, medical evidence also does not support the case of the prosecution and consequently, the prosecution failed to show that it was the accused-respondent, who had taken the victim to the balcony of the cinema theatre to perpetrate the alleged crime. In the result, the trial court came to the conclusion that no reliable evidence was established that accused-respondent was the same person, who had sexually assaulted the victim, and therefore, came to the conclusion that the prosecution has failed to prove the guilt of the accused-respondent, beyond reasonable doubt, and accordingly accused was acquitted.

10. Mrs. Deshmukh, learned Additional Public

Prosecutor on behalf of the State vehemently contended that the High Court should consider the evidence of prosecution witnesses, mainly PW 4 victim and PW 3 Adika grand-mother of victim. She further submitted that in cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or discrepancies in the statement of the prosecutrix should not have been taken into consideration, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case.

11. Since the inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitates looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an

accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? [**State of Punjab Vs. Gurmit Singh**² (paragraph 7).]

12. Mrs. Racheeta R. Dhuru, learned advocate appointed for the accused-respondent, on the other hand, submitted that even in cases of sexual assault, the onus remains on the prosecution to establish its case “beyond reasonable doubt” and in the present case, if the prosecution fails to establish its case beyond reasonable doubt, the accused is entitled to the benefit of reasonable doubt, in the background of the fact that the accused-respondent is also entitled to the “presumption of innocence”, moreso, after acquittal by the trial court. Learned advocate further submits that medical evidence

2 AIR 1996 SC 1393

produced in the course of trial actually falsifies / and/or contradicts the very foundation of the allegations against the accused-respondent. Apart from the above, the learned advocate reiterated the findings of the learned trial court, insofar as, the failure on the part of the prosecution to establish the fact that, it was the accused-respondent, who had committed the criminal sexual act, and submitted that the trial court was correct in the facts and circumstances of the case to conclude that the prosecution had failed to establish the fact that the accused-respondent was in fact the person, who had committed the alleged perpetrated crime.

13. In the light of the findings arrived at by the learned trial court and the submissions advanced on behalf of the prosecution by the learned APP Mrs. M. M. Deshmukh and the learned advocate Mrs. Racheeta Dhuru for the accused-respondent, we have perused the entire evidence, both oral and documentary, in the course of hearing of this appeal. We are

also of the considered view that the the act of sexual crime on prosecutrix PW 4 victim at her tender age of 7 years, is something which definitely is abhorrent in nature and shocking to our judicial conscience. We are not reiterating the evidence of prosecution, which has already been discussed at length hereinabove. Suffice it to say that we agree with the findings of the learned trial court. There is nothing to ascribe any ill motive or any reason for the PW 4 victim to make any false statement in the present case, but insofar as, identification of accused-respondent, as the perpetrator of the crime is concerned, it is relevant here to refer to the evidence of PW 3 Adika (the grandmother of prosecutrix PW 4 victim), and the evidence of PW 2 Ashok, uncle of prosecutrix. The accused-respondent was an employee of the local cinema theatre and PW 3 Adika was suspecting that the alleged act must have been done by a person from local cinema theatre. In cross-examination he stated as follows:

“All persons from the cinema theatre were shown to

victim and she said that they were not the said person.”

14. In the light of the aforesaid fact, we are of the considered view that the views of the learned trial court insofar as the failure of the prosecution to establish the accused-respondent as the perpetrator of the crime is absolutely in order.

15. Another aspect that needs to be noted also herein relates to the medical evidence. Although the learned trial court in its judgment and in particular in paragraph 19 has noted that the medical evidence is “no doubt clinching to support the version of the victim (PW 4)”. We have gone through both, the oral as well as documentary evidence. Insofar as the oral evidence is concerned, the only medical officer examined is PW 5 Dr. Akshay Kavishwar. It appears that PW 5 was working as a medical surgeon at Walchand Nagar during the relevant time and one Dr. (Ms.) Nevargi had examined the victim (PW 4) on 8.1.1993 initially, and once again on 12.1.1993. Since Dr.

(Ms.) Nevargi had certain doubts on 12.1.1993 regarding redness on the opening of victim's vagina, she had put a question mark in to her treatment records and sought the views of PW 5, who noted as follows:

“Redness on the opening of vagina that it could be a sexual assault.”

16. The point most relevant to see from paragraph 1 of evidence of PW 5 Dr. Kavishwar is that Dr. (Ms.) Nevargi, who had initially physically examined the victim on 8.1.1993, had recorded in the medical papers on the same day, that on her examination, “genitalia was found normal”. Thereafter, on the next date of examination i.e. on 12th January, 1993 on re-examination of the prosecutrix, she was not sure regarding the probable cause of “redness of the victim's vagina” and after putting a question mark in the report, she sought the opinion of her senior. PW 5 Dr. Kavishwar who never examined the victim, and after a discussion with Dr. (Ms.) Nevargi, concluded that, “the redness on the opening of vagina could be a sexual assault”.

What is even more intriguing in the present case is that, the victim was once again medically examined at Sasoon Government Hospital, Pune on 18.1.1993 (since the FIR was lodged on 17.1.1993). In examination report (Exhibit 123), it is recorded as under:

“Examination of hymen
vagina (how many fingers : Hymen intact. Does not
it admits) admit any fingers.

Final opinion : No evidence of intercourse.”

17. The medical evidence, as referred hereinabove, clearly indicates that while on 6th January, 1993, the prosecutrix was examined by Dr. (Ms.) Nevargi, who recorded that “prosecutrix's genitalia was normal”. On the next date of examination i.e. on 12th January, 1993, the said Dr. (Ms.) Nevargi was not sure of the cause of redness on the opening of vagina, she sought for an opinion from PW 5 Dr. Kavishwar, who, without even examining the prosecutrix, after a discussion with his colleague opined that, “redness on opening of vagina

could be on account of sexual assault. Thereafter on 18th January, 1993 the Doctor at Sasoon Government Hospital, Pune, found that, the “hymen of the victim was intact” and it does not admit any finger, and in the final opinion states that, there is “no evidence of intercourse”.

18. We have considered the entire evidence led during the course of trial, and in particular, the evidence of prosecutrix PW 4 victim, PW 3 Adika, grandmother of the prosecutrix; PW 2 Ashok, uncle of prosecutrix; evidence of PW 5 Dr. Kavishwar as well as all other documentary evidence produced on record in the course of trial and we find no justifiable reason to differ with the conclusions arrived at by the learned Sessions Judge in the case at hand. Accordingly, appeal is dismissed for the reasons, as recorded hereinabove.

Sd/-
[PRAKASH D. NAIK, J.]

Sd/-
[INDRAJIT MAHANTY, J.]

Vinayak Halemth