

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.38 OF 2014

Vikas s/o Vishnu Ghatule
Age : 20 years, Occ. : Nil
R/o : Aditya Engineering,
Behind NIMA House, Malegaon MIDC,
Sinnar, District Nashik
(Original native of Malsangvi,
Tal. Shelu, District Parbhani)
[At present Nashik Central Jail)

.... Appellant
(Ori. Accused)

Vs.

The State of Maharashtra

.... Respondent

Mr. Aniket Vagal, Court appointed Advocate for the Appellant.
Mr. S.H. Yadav, APP for the State.

Coram : Smt. Sadhana S. Jadhav, J.

Judgment Reserved on : 21st November 2018

Judgment Pronounced on : 25th April 2019

JUDGMENT :

1 The appellant herein is convicted for the offence punishable under Sections 376(2)(i) of the Indian Penal Code and sentenced to suffer rigorous imprisonment for ten years and a fine of Rs.5,000/- in default, rigorous imprisonment for six months by

Additional Sessions Judge- 1, Nashik vide judgment and order dated 30th December 2013. The learned Judge has also directed that if the fine amount is paid, an amount of Rs.4,000/- be paid to the natural guardian of the prosecutrix towards compensation. Alternatively, the appellant was also charged for the offence punishable under Section 4 of the Protection of Children from Sexual Offences Act. There is no order passed as far as Section 4 of the POCSO Act. Hence, this appeal.

2 It is the case of prosecution that on 11th April 2013, the mother of the victim namely Sangita Shailesh Mannikar (Kulkarni) lodged a report at Sinnar Police Station alleging therein that on 10th April 2013, her daughter, aged 4 years had gone for playing on the open ground. She returned home at about 6.00 pm. Her husband had left house for night duty at about 6.30 pm. She had dinner at about 8.30 pm. alongwith her daughters. She found that her minor daughter was crying. At about 11.30 pm., she enquired with the daughter and at that time, the child had disclosed that in the afternoon at about 12.30 noon, when she was playing on the open

ground, the present appellant had lured her and taken her to his house on the pretext of giving her Vada-pav. He had given her Pav Vada and that he had sexually abused her and had inserted a tooth brush in her private part. She examined the child and found swelling on her person and thereafter she had put her to sleep. She had not informed her husband about the same. In the morning at about 8.00 am., she had informed her husband about the ghastly act committed by the present appellant. Her husband had initially informed to the relatives about the said incident and had been in search of the accused and since the accused was not found, they had approached the police station and lodged a report.

3 On the basis of the said report, Crime number 93 of 2013 was registered against the accused for the offence punishable under Section 376 (2)(i) of the Indian Penal Code and under Section 4 of the Protection of Children from Sexual Offences Act, 2012. The accused was arrested. After completion of investigation, the charge-sheet was filed. The case was committed to the Court of Sessions and registered as Sessions Case No. 204 of 2013.

4 The prosecution has examined seven witnesses to bring home the guilt of the accused.

5 It is pertinent to note that the statement of the victim was not recorded either in the course of investigation or in the course of the trial.

6 PW-1, Sangita Shailesh Mannikkar happens to be the mother of the victim. She has proved the contents of F.I.R. In the cross-examination, PW-1 has admitted that her family is residing in the campus of Aditya Engineering, Malegaon. Her husband is serving in Tuf Metallic Company. The accused is also residing in the same campus and his house is at a distance of 25 feet from their house. The appellant/accused is working as an Operator in Aditya Engineering. The accused was residing with his parents and two brothers. The owner of Tuf Metallic Company and Aditya Engineering is one and the same. The suggestion that her husband

and herself were attempting to obtain a job in Aditya Engineering has been denied. She had feigned ignorance about the accused serving in Aditya Engineering since three years. She has further admitted that there were cordial relations between the family of the accused and her family. The accused is about 20 years old. She has denied the suggestion that on the day of the incident, the accused had received bhishi amount of Rs.10,000/- and that she had demanded Rs.5,000/-. According to her, she had not informed her husband about the disclosure made by her daughter, since it was night time. It is pertinent to note that she has given her cellphone number while lodging the F.I.R..

7 PW-2 Shailesh Manikkar, father of the victim has deposed that he was on night duty. When he received the phone-call from his wife, he returned home after completing his duty. He then approached the Police after consultation.

8 PW-3, Dr. Jayashree Deepak Chirmade was serving as the Chief Medical Officer at Civil Hospital, Nashik. She had examined

the victim. She has deposed that **“the history of sexual assault by known person on 10th April 2013 around 4.00 pm. as stated by mother of the patient.** She has also stated about pain at vaginal area and reddishness at the said area. It is further stated that the injury to Erythematous and symptoms referred above could be possible on account of sexual assault. She has proved the medical report and the same is marked at Exhibit 25. In the cross-examination, it is stated that externally Erythematous was appearing.

9 Erythematous as defined in medical dictionary is “exhibiting abnormal redness of the skin or mucous membranes due to accumulation of blood dilated capillaries (as in inflammation). It is related to or marked by erythema. Erythema is caused by hyperemia i.e. increased blood flow in superficial capillaries. The causes could be sunburn to allergic reaction that can be triggered by an infection. Doctor has not stated anything further. The medical report, which is at Exhibit 25 is as follows:

“Victim was forced to undergo sexual intercourse on 10th April 2013 around 4.00 pm. and as patient

was a minor and complaining of pain at vaginal area and redness at vulval area - and as told by patient's mother”.

Column no. 12. : Local examination of genital parts shows nothing abnormal detected. Hymen intact. Erythematous area about 1½ x 1 cm. On either side of vaginal opening. Opinion reserved, pending availability of reports of the sample sent.

10 PW-4, Dnyaneshwar Sukhdeo Ganjave has proved the spot panchanama and the photographs of the scene of offence. The photographs are of the premises of Aditya Engineering Company and the houses. That the space between office of Aditya Engineering and tin shed, which is shown as house of the complainant is full of small bushes, stones and rubble. The room of the accused as per panchanama is of the Security Section of Aditya Engineering Company. The panchanama further indicates that the accused had ravished the victim just at a distance of 10 feet from the security room. It is pertinent to note that the prosecution has neither examined any security personnel nor any employee of the Company to show that either the girl was playing during the day or anyone had seen the accused taking the girl alongwith him. The duty hours

of the accused were 10.00 am. to 6.00 pm. It is pertinent to note at this stage that the charge-sheet contains scene of offence panchanama, the seizure panchanama i.e. seizure of clothes of the accused and the victim and the recovery of tooth brush at the instance of the accused. The witnesses, whose statements are recorded in the course of investigation are the parents of the victim and their relatives, who at the relevant time were residing at Udgir, Ahmedpur and the carrier of sample to the Forensic Lab. It is not known as to why the investigating agency had not recorded the statements of the owner or the Manager of the company, any security personnel or any other child with whom the victim was playing. There is no playground in the said premises for the children to play. The entire area is of dense bushes, stone and rubble except pathway for the employees to attend their jobs. Although the prosecution is under the provisions of POCSO Act, the investigating agency have not recorded the statement of the victim under Section 162 or 164 of Code of Criminal Procedure. In fact, this is a case of no investigation at all and the entire prosecution case rests upon oral

evidence of the mother of the victim. This is yet another case of casual investigation. The police just ignore the fact that the victim is at the focal point of investigation and prosecution. Her evidence is the fulcrum to decide the nature of the offence and guilt of the accused. There is violation of Sections 24, 25 and 26 of the POCSO Act.

11 PW-6, Kalyan Laxman Pawar is the Police Inspector, who has conducted the investigation. He has deposed before the Court about the steps taken by him in the course of investigation. According to him, the parents had approached the Police Station on 11th in the evening. The F.I.R. also shows that the offence was registered at 6.15 pm. on 11th April 2013 i.e. after 24 hours. It is elicited in the cross-examination that the distance between the house of the victim and the house of the accused is hardly 15 feet. The room of accused is situated at North-West corner of the campus of the company.

12 PW-7, Dr. Gorakhnath Kisanrao Gore was also officiating as Gynaecologist at Civil Hospital, Nashik. According to him, the injuries could be possible if fingers or tooth brush are inserted into the private part of the girl. He had conducted ossification test. He has admitted in the cross-examination that at the relevant time of examination, external or internal injuries were not found on the victim. It appears that his deposition is on the basis of memory as it is not in consonance with the report at Exhibit 25.

Vagina and Cervix “Erythematous area about 1 ½ x 1 cm. On either side of vaginal opening”

In the statement recorded under Section 313 of Cr.P.C., the accused has stated as follows :

“On account of frequent quarrels due to use of bathroom, the informant and her husband in collusion implicated me in a false case”.

13 It appears that the learned Court has only considered Section 29 of POCSO Act. Section 29 reads as follows:

“29. Presumption as to certain offences – Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted

or attempted to commit the offence, as the case may be **unless the contrary is proved.**”

This clause provides for presumption as to certain offences. It provides that where a person is prosecuted for violating any of the provisions under Clauses 3, 5, 7 and 9 of the proposed legislation, and where the victim is a child below the age of sixteen years, the Special Court shall presume that such person has committed the offence, **unless the contrary is proved.**

14 PW-7, Dr. Gorakhnath Kisanrao Gore has deposed before the Court that he had examined Ms.”X” on 11th April 2013. According to him, he had found erythematous area measuring 1.5 x 1 cm. This Court has observed that PW-7, Dr. Gorakhnath Gore has deposed on the basis of his memory and the same is not supported by the medical records and therefore cannot be relied upon. In the eventuality that he had observed that there was injury on the private part, he ought to have mentioned the same in the reports.

15 Erythematis means abnormal redness of the skin due to local congestion as in inflammation. The medical dictionary defines Erythema (from the Greek erythros, meaning red) is redness of the

skin or mucous membranes, caused by hyperemia (increased blood flow) in superficial capillaries. It occurs with any skin injury, infection, or inflammation. Examples of Erythema not associated with pathology include nervous blushes.

16 It is true that the investigation is pathetic. The cross-examination on relevant material is insufficient, however, that by itself would not be sufficient to disbelieve the child.

17 Learned counsel for the appellant has rightly submitted that the act as narrated by the child does not fall under Section 4 of the POCSO Act and therefore the presumption would not come into picture. It is submitted that a presumption cannot be drawn in the absence of any material to prove the nature of the offence, which would stand un-controverted by any evidence. The question is whether there was a strong motive for the parents of a minor girl to expose their child to social obloquy by initiating false prosecution against the present appellant. Upon perusal of the material collected in the course of investigation and the evidence recorded at the trial,

it can be said that the incident has been blown out of proportion. In fact, in the present case, penetrative sexual assault has not been proved by the prosecution due to lack of medical evidence. The Doctor has noted that the erythematous nature of injury would show that there was some injury which was caused to the victim on her private parts.

18 Upon considering the nature of evidence, this court is of the opinion that the offence as committed by the accused would fall under Section 8 of the Protection of Children from Sexual Offences Act, although, no charge is framed. This court can pass orders as contemplated under Section 386(b)(ii) Cr.P.C., which reads as follows :

“386. Powers of the Appellate Court- After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and in case of an appeal under Section 377 or Section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may ----

(a)

(b) in an appeal from a conviction

- (i)
- (ii)
- (iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;

19 The charge was framed under Section 376(2)(i) of the Indian Penal Code. Section 376(2)(i) of the Indian Penal Code reads as “whoever commits rape on a woman when she is under 16 years of age or”. In view of the fact that in the present case, the provisions of the Protection of Children from Sexual Offences Act, 2012 are attracted. Section 376(2)(i) of the Indian Penal Code would have no relevance. The said Act is for the protection of girls under the age of 18 years and in any case Clause (i) is omitted by Act 22 of 2018 with retrospective effect from 21st April 2018.

20 In the facts of the case, where there is no cogent and consistent material to hold that this is a case of penetrative sexual assault, conviction of accused under Section 7 of the POCSO Act and punishment under Section 8 of the POCSO Act would meet the ends of justice.

21 It would be difficult to part with the judgment without appreciating the efforts taken by the learned counsel appointed to espouse the cause of the appellant. His professional fees are quantified to be paid. Hence, the following order :

O R D E R

- i) The appeal is partly allowed.
- ii) The appellant herein is acquitted of the charges under Section 376(2)(i) of the Indian Penal Code and Section 4 of the POCSO Act.
- iii) The appellant herein is convicted for the offence punishable under Section 7 read with Section 8 of the POCSO Act, 2012 and is sentenced to the period already undergone as he has undergone more than five years of substantive sentence.
- iv) The sentence of fine is maintained.
- v) The appellant to pay compensation as directed vide judgment and order dated 30th December 2013 to the natural guardian of the prosecutrix from the fine amount, if paid.

vi) Professional fees are quantified as per rules to be paid to the learned counsel, Mr. Aniket Vagal by the High Court Legal Aid Services Committee, within three months.

(Smt. Sadhana S. Jadhav, J)