

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 154 OF 2016**

Mr. Vishwas Somnath Bansode.

Age : 21 yrs., Occ: Student,

R/at Yamunanagar Slum Area,

Vimannagar, Dist. Pune.

(At present lodged at Yerwada Central

Prison, Pune-05.)

..Appellant.

v/s.

1 State of Maharashtra.

(Through Officer-in charge

of Vimantal Police Station, Pune.

2 Master X, though the

guardianship of Aunty Jyoti

@ Manjula Sumant Waghmare.

Yamunanagar, Vimannagar, Pune.

..Respondents.

Ms. Nagma Tandon, advocate for appellant.

Mr. Aniket Vagal, advocate appointed for complainant.

Mr. S.H. Yadav, APP for State.

CORAM : SMT. SADHANA S. JADHAV,J.

DATE : DECEMBER 12, 2018.

JUDGMENT :

1 The appellant herein is convicted for the offence punishable under section 377 of the Indian Penal Code and sentenced to suffer R.I.

Talwalkar

for 10 years and to pay fine of Rs. 5000/- I.d. to suffer R.I. for 6 months. He is also convicted for the offence punishable under section 4 of the Protection of Children from Sexual Offences Act, 2012 and sentenced to suffer R.I. for 10 years and to pay fine of Rs. 5000/- I.d. to suffer R.I. for 6 months. He is also convicted for the offence punishable under section 8 of the Protection of Children from Sexual Offences Act, 2012 and sentenced to suffer R.I. for 5 years and to pay fine of Rs. 5000/- I.d. to suffer R.I. for 6 months by the Special Judge & District Judge-1, Pune (Under the Protection of Children from Sexual Offences Act, 2012) in Special (C) Sessions Case No. 145 of 2014 vide Judgment and order dated 27/1/2016. Hence, this appeal.

2 The bail was refused to the appellant/accused and hence, he had filed Petition for Special Leave to Appeal (Cri) No. 9214 of 2016 before the Hon'ble Supreme Court and the Hon'ble Apex Court had directed the High Court to hear the appeal expeditiously. Pursuant to the said order, this appeal is being finally disposed of out of turn.

3 Such of the facts necessary for the decision of this appeal are as under :

(i) It is a case of the prosecution that on 19/11/2013 Ms. Jyoti @ Manjula Waghmare who happens to be the paternal aunt of the victim

lodged a report at the police station alleging therein that on 19/11/2013, her nephew Master X was playing in the afternoon with the present appellant. She could not see the boy near the house and therefore, she had enquired with the sister of the appellant who had informed her that her brother had taken him up-stair.

(ii) At about 1 p.m. her mother had been to fetch master X. She found him crying and therefore, upon enquiry, he disclosed that the appellant had sexually abused him by attempting to have intercourse through his anus. The child was brought home.

(iii) The complainant had called Sister Jospin Furnandis, member of Church. The incident was disclosed to the Sister and thereafter, she had informed the police telephonically and the report was lodged. On the basis of the said report, Crime No. 3161 of 2013 was lodged at Vimantal Police Station on 19/11/2013.

(iv) After completion of investigation, charge-sheet was filed on 19/6/2014. The case was committed to the Court of Sessions and registered as Sessions Case No. 145 of 2014. The prosecution examined 6 witnesses to bring home the guilt of the accused.

4 P.W. 1 is the victim. He was taken into confidence by the learned Court. He had disclosed that the appellant had sexually abused him and given him pebbles i.e. he had thrown pebbles on the cot. According to him, he was taken on the terrace and then the act was committed. He has deposed that he has disclosed this incident to his mother. In fact, she was grand-mother. In the cross-examination, the child witness has disclosed that his mother i.e. grand mother had asked him to depose accordingly.

5 P.W.2 is the complainant. She has deposed in consonance with her first information report. In the cross-examination, she has stated that the child had gone to the house of the accused for the first time. However, he was attached to the brother of the accused.

6 P.W. 3 is Ajay Kale who has acted as panch for seizure of the clothes.

7 P.W.4 Sakhahari Sopanrao Shelke was attached to Vimantal Police Station as PSI. According to him, he had written down the report at Exh. 11 i.e. FIR. The statement was recorded in the presence of Sister/Social worker J.A. Fernandis. In the cross-examination, he has stated that he was informed by the complainant that anus was washed

by means of dettol and that they had not found semen stains on the clothes of the accused and the child.

8 P.W. 5 Dr. Abhijit Mane was working as Casualty Medical Officer at Sassoon Hospital, Pune. He had examined the victim at the first instance. The victim and his father had given the history to the effect that the victim was sexually assaulted. He was referred to pediatric surgeon and on the basis of the report of Dr. Dashmit Singh, P.W.5 had issued certificate which is at Exh. 22. He has specifically deposed that on examination, evidence of sodomy not confirmed. It is also stated by P.W.5 that if there is only attempt to commit such offence, then there might not be evidence of injury.

9 P.W. 6 Dr. Nilesh Jagane has examined the child and has issued certificate which is at Exh. 24. He has proved the certificate. He has specifically stated that he had not found any signs of attempt of carnal intercourse. The doctor has also reduced the history as narrated by the victim and his parents. The observations of the doctor are as follows :

“No evidence of any fissure or mucosal tear. Victim has passed stools after the alleged incident.”

The parents were not willing to admit the child for a day for personal

reasons and it is noted that the doctor or the hospital would not be responsible for any untoward consequences.

10 Examination under section 313 of the Code of Criminal Procedure, 1973, the accused has stated as follows :

“I have done nothing. Master X was playing in front of my house. He sustained jolt from me. He fell down. ON that his aunt (Atya) has quarreled with me and filed a false case against me.”

11 The prosecution has not examined either grand-mother or the social worker to prove the initial disclosure by the victim. In fact, it was incumbent upon the prosecution to have recorded the statement of the child and the first informant under section 164 of the Code of Criminal Procedure. The child has deposed before the Court that he has deposed as per the say of his grand-mother and the first informant. Three year old child could be amenable to be tutored.

12 Exh. 22 which is medical certificate issued by Sassoon General Hospital specifically indicates that “there is no evidence of any fissure or mucosal tears. No external injuries. **On examination, evidence of Sodomy not confirmed.**” In view of this observations, it can be inferred that the possibility of attempt to commit sodomy may not be ruled out.

In view of this, the appellant would be liable to be convicted for an offence punishable under section 7 read with section 8 of the Protection of Children from Sexual Offences Act, 2012. Section 7 reads as follows :

“7. Sexual assault.-

Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.”

13 The scene of offence panchanama shows that the room was 12 x 9 sq. ft. There is iron ladder to go to the mezzanine floor. In that room, there is cot, suing machine, 2 cupboards, small passage to go to small balcony. There is no terrace to the house. The child has disclosed that the incident had occurred in the nuclear balcony. Before the court the victim has stated that he is made to lie on the cot and then heinous act was committed by the accused. It appears that the child was confused and no implicit reliance can be placed to hold that there was, in fact, carnal intercourse by the accused-appellant. The narration is not supported by the medical evidence as well.

14 In these circumstances, conviction imposed upon the appellant for offence punishable under section 377 of the Indian Penal Code read with section 4 of the POCSO Act deserves to be quashed and

set aside. Instead, deserves to be convicted for the offence punishable under section 7 read with section 8 of the POCSO Act and sentenced to suffer R.I. for 4 years.

15 Hence, following order is passed :

ORDER

(i) The appeal is partly allowed and disposed of.

(ii) The conviction of the appellant imposed vide Judgment and Order date 27th January, 2016 by the Special Judge and District Judge-1, Pune for the offence punishable under section 377 of the Indian Penal Code in Special (Child) No. 145 of 2014 is hereby quashed and set aside and instead the appellant is convicted for the offence punishable under section 7 read with 8 of the Protection of Children from Sexual Offences Act, 2012 and is sentenced to suffer rigorous imprisonment for four years.

(iii) The amount of Rs. 10,000/- be given to the father of the victim by way of compensation under section 357 of Code of Criminal Procedure.

[SMT. SADHANA S. JADHAV, J.]