

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPEAL NO.420 OF 2014
WITH
CRIMINAL APPLICATION NO.1254 OF 2016
IN
CRIMINAL APPEAL NO.420 OF 2014**

RAJENDRA BHIMA ASUDEO)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Ms.Nagma Tandon, Advocate for the Appellant.

Mr.S.V.Gavand, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 31st JULY 2018

JUDGMENT :

1 The appellant/accused, by this appeal, is challenging the judgment and order dated 14th February 2014 passed by the learned Special Judge under Protection of Children from Sexual Offences Act, 2012, in Special (Child) Sessions Case No.11 of

2013, thereby convicting the appellant/accused of offences punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as POCSO Act) as well as under Sections 354 and 506 of the Indian Penal Code. For the offence punishable under Section 6 of the POCSO Act, the appellant/accused is sentenced to suffer rigorous imprisonment for 10 years apart from imposition of fine of Rs.2,000/- and default sentence of rigorous imprisonment for 3 months. For the offence punishable under Section 354 of the Indian Penal Code, he is awarded rigorous imprisonment for 1 year apart from direction to pay fine of Rs.1,000/- and in default, to undergo rigorous imprisonment for 2 months. Rigorous imprisonment of 2 years is awarded to the appellant/accused for the offence punishable under Section 506 of the Indian Penal Code.

2 Facts, in brief, leading to the prosecution of the appellant/accused, can be summarized thus :

(a) PW2 Savita is the mother of the victim female child/PW1.

 PW2 Savita and PW3 Pallavi Basutkar are neighbours. They

were residing in Tamboli Galli, Gultekadi area of Pune. They both were working as maid servants for earning their livelihood. PW2 Savita used to leave her house early in the morning for working and she used to return back in the afternoon. Then again, she used to go for work and used to return back in the evening hours. Her husband was also required to leave the house for attending his job in the morning hours itself.

- (b) On 22nd March 2013, PW3 Pallavi Basutkar informed PW2 Savita that the appellant/accused had beaten her daughter viz. PW1/victim female child. PW2 Savita, therefore, went to the place of work of her husband and told this fact to him. In the evening, her husband returned and told PW2 Savita that prior to 3/4 days, the appellant/accused had put his penis in the mouth of their daughter viz. PW1/victim female child. They both then made detail enquiry from their daughter viz. PW1/victim female child. She narrated the incident and further informed that the appellant/accused

had threatened her that he would kill her, if the incident is disclosed to anybody else. She disclosed to her parents that prior to 3/4 days, the appellant/accused had put his penis in her mouth.

- (c) PW2 Savita along with others then went to Police Station Swargate and lodged the report Exhibit 13. The PW1/victim female child was then sent for medical examination at the Sassoon Hospital, Pune, on 24th March 2013. She was examined by PW4 Dr.Reshma Waghmare, Chief Resident, working at the Sassoon Hospital, Pune. Statements of witnesses were recorded and the appellant/accused came to be arrested. On the basis of his disclosure statement - Exhibit 24, a stick came to be recovered from his house vide Panchnama Exhibit 25. On completion of investigation, the appellant/accused came to be charge-sheeted.

- (d) The Charge for offences punishable under Sections 354, 324, 376(2)(f) read with 511 and 506 of the Indian Penal

Code as well as under 4 and 6 of the POCSO Act came to be framed and explained to the appellant/accused. He pleaded not guilty and claimed trial.

- (e) In order to bring home the guilt to the appellant/accused, the prosecution has examined in all five witnesses. The victim child is examined as PW1. Her mother Savita is examined as PW2. Exhibit 13 is the First Information Report (FIR) lodged by her on 22nd March 2013. Their neighbour Pallavi Basutkar is examined as PW3. Medical Officer working at Sassoon Hospital, Pune, Dr.Reshma Waghmare is examined as PW4. Medico Legal Certificate issued by this witness is at Exhibit 20. Investigating Officer Anil Koli, Assistant Police Inspector, attached to Swargate Police Station, Pune, is examined as PW5.
- (f) Defence of the appellant/accused was that of total denial. According to him, he was residing in a small room along with his wife, parents, grandmother and sister. His

grandmother used to remain present in the house throughout, because of her illness. He is falsely implicated in the crime in question at the instance of leader of the locality named Sunita Nemoor. The appellant/accused examined his sister Poonam Asudeo as defence witness.

- (g) After hearing the parties, the learned trial court came to the conclusion that the appellant/accused outraged modesty of the PW1/victim female child and committed aggravated penetrative sexual assault on her by inserting his penis in her mouth. The appellant/accused had voluntarily caused hurt to the PW1/victim female child and threatened to kill her. Accordingly, the appellant/accused came to be convicted for offences punishable under Sections 354 and 506 of the Indian Penal Code as well as under Section 6 of the POCSO Act. He is, accordingly sentenced, as indicated in the opening paragraph of this judgment.

3 I have heard the learned advocate appearing for the appellant/accused at sufficient length of time. She took me through evidence of PW2 Savita as well as PW3 Pallavi Basutkar and argued that evidence of both these witnesses is not consistent. PW3 Pallavi Basutkar has not clarified as to when she met PW2 Savita and what was the point of time of such meeting. Disclosure made by PW3 Pallavi Basutkar to PW2 Savita reflected from the FIR Exhibit 13 is not in tune with the oral evidence adduced by these witnesses. It is further argued that the appellant/accused is falsely implicated in the crime in question as he had built temple in the locality and this fact is not liked by Sunita Nemoor, who happens to be the local leader. It is further argued that the FIR is delayed and despite availability of the victim child, her statement came to be recorded belatedly. Medical examination of the victim child is also delayed and was conducted on 24th March 2013. Even the Medico Legal Certificate shows that the incident was first disclosed to Sunita Nemoor. The learned advocate further argued that evidence on record shows that said Sunita Nemoor was present right from lodging the FIR till conclusion of the

investigation. However, she has not been examined by the prosecution. Similarly, father of the victim child is also not examined by the prosecution. It is also argued on behalf of the appellant/accused that evidence of defence witness Poonam Asudeo shows that the grandmother of the appellant/accused used to remain present in the house throughout, and therefore, it was not possible for the appellant/accused to commit the alleged crime in his house. Therefore, the appellant/accused is entitled to acquittal.

4 As against this, the learned APP supported the impugned judgment and order by arguing that considering the nature of offence, evidence of the victim child is of prime importance and other minor inconsistencies are required to be overlooked. The learned APP submitted that evidence of the child witness is inspiring confidence and the same is corroborated by medical evidence on record. The appeal is, therefore, liable to be dismissed.

5 I have carefully considered the rival submissions and also perused the record and proceedings including oral as well as documentary evidence. Considering the nature of allegations leveled against the appellant/accused, fate of the prosecution case largely depends upon testimony of the PW1/victim female child, who at the relevant time was just 10 years of age. She is the alleged victim of the crime in question. It is in her evidence that, appellant/accused Rajubhau resides near her house, and therefore she knows him. She further stated that the incident took place around 12.30 noon. At that time, she was proceeding towards her house. The appellant/accused accosted her and took her to his house. The PW1/victim female child stated that, thereafter, the appellant/accused put his penis in her mouth, and then, she perceived that something had gone in her stomach. The appellant/accused then threatened her that if she disclosed this thing to her parents, he would kill her. As per version of the PW1/victim female child, on the next day of this incident, when she was proceeding by road, the appellant/accused came, took pinches at her chest and had bitten on her cheeks. On the third

day, when she was proceeding, the appellant/accused pulled her at the side, put his mouth on her mouth and discharged gutkha in her mouth. On the fourth day, the appellant/accused came to her school and by biting his own lips, gave a threatening gesture. The PW1/victim female child further deposed that because of these acts of the appellant/accused, she had a stomach ache. She disclosed the things happened with her to her mother and then her mother took her to the Police Station.

6 Cross-examination of the PW1/victim female child shows that she had been to the house of Sunita Nemoor, who has dominance in the area, prior to recording of her statement by the police. She further admitted that said Sunita Nemoor was with her mother at the time of lodging the FIR. The PW1/victim female child also admitted that there was dispute between the appellant/accused and Sunita Nemoor. This witness denied the suggestion that because of illness, grandmother of the appellant/accused is bed-ridden. She stated that grandmother of the appellant/accused used to sell vegetables on road. From

evidence of this witness, the defence has brought on record two omissions. She has not stated to police that the things troubled her and there was stomach ache. She has also not stated to police that lastly the appellant/accused came and gave threatening gestures by biting his own lips.

7 Now let us put on record, what is the result of medical examination of the PW1/victim female child. The FIR came to be lodged by her mother PW2 Savita on 22nd March 2013 and the PW1/victim female child was examined by PW4 Dr.Reshma Waghmare, Chief Resident of Sassoon Hospital, Pune, on 24th March 2013. Following injuries were noted by this Medical Officer on person of the PW1/victim female child :

- “i) Superficial abrasion of 2 x 0.5 cm. in dimension, lateral to right side of the umbilicus.
- ii) Superficial abrasion of 3 x 0.5 cm. in dimension, above and lateral to right side of umbilicus.

- iii) 1.5 x 1 cm. Superficial abrasion over the lower back in the midline at the level of iliac crest.
- iv) Superficial multiple abrasions 3 in number of size 2.05 cm. each, more on left scapular region on back.
- v) 1.5 x 1.5 cm. bruise seen over left malar bone.
- vi) Tenderness all over chest present.”

PW4 Dr.Reshma Waghmare proved Medico Legal Certificate at Exhibit 20 which reflects the external injuries on person of the PW1/victim female child apart from the fact that her hymen was found wide open.

8 PW3 Pallavi Basutkar is neighbour of the PW1/victim female child. As per version of PW3 Pallavi Basutkar, she heard the PW1/victim female child was talking with other children as to whether the things be disclosed to “Binti mavashi”. PW3 Pallavi

Basutkar further deposed that she, therefore, asked the PW1/victim female child as to what happened and upon that, the PW1/victim female child verbally as well as by gestures told her that the appellant/accused had put his penis in her mouth. PW3 Pallavi Basutkar further deposed that on the next day morning, she disclosed what she heard to PW2 Savita. In cross-examination, this witness has stated that Sunita Nemoor is leader of local ladies, and further stated that, she herself as well as said Sunita Nemoor were present at the time of lodging the FIR. PW3 Pallavi Basutkar in her cross-examination has stated that after 21st March 2013, she never visited the house of PW2 Savita.

9 As per version of PW2 Savita, PW3 Pallavi Basutkar told her that the appellant/accused took her daughter i.e. the PW1/victim female child to his house and put his penis in her mouth. She then conveyed this fact to her husband by visiting the workplace of her husband. Her husband then told her that he would look into the matter when she returns to the house. PW2 Savita further deposed that then she asked her daughter – the

PW1/victim female child, and her daughter disclosed to her that the appellant/accused had put his penis in her mouth and had asked her to remove her nicker, but on refusal, he had beaten her. PW2 Savita further deposed that she then lodged report Exhibit 13 by visiting the Police Station with her husband as well as Sunita Nemoor.

10 This witness has denied the suggestion that the appellant/accused is falsely implicated in the crime in question because of construction of temple by him near their house. She denied that her family is having inimical relations with the appellant/accused.

11 This is the material evidence adduced by the prosecution for inferring guilt of the appellant/accused in the crime in question. The main thrust of the defence is on alleged false implication of the appellant/accused, at the instance of local leader Sunita Nemoor. According to the defence version, the appellant/accused has constructed a temple in the locality, which

is not liked by the said Sunita Nemoor, and therefore, she conspired with PW2 Savita and falsely implicated the appellant/accused in this case. At this juncture, it is apposite to quote the observations of the Honourable Apex Court as found in paragraph 10 in the matter of **Bharwada Bhoginbhai Hirjibhai V/s. State of Gujarat**¹ :

“Without the fear of making too wide a statement or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural society. It is also by and large true in the context of the sophisticated not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because -

(1) A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred.

1 AIR 1983 Supreme Court 753(1)

(2) She would be conscious of the danger of being ostracized by the Society or being looked down by the society including by her own family members, relatives, friends, and neighbours.

(3) She would have to brave the whole world.

(4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered.

(5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family.

(6) It would almost inevitably and almost invariably result in mental torture and suffering to herself.

(7) The fear of being taunted by others will always haunt her.

(8) She would feel extremely embarrassed in relating the incident to others being overpowered by a feeling of shame on account

of the upbringing in a tradition bound society where by and large sex is taboo.

(9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought in to controversy.

(10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman, would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour.

(11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocent.

(12) The reluctance to face interrogation by the investigating agency, to face the Court, to face the cross-examination by counsel for the culprit, and the risk of being disbelieved, act as a deterrent.”

12 In the case in hand, the victim of the crime is 10 years old daughter of PW2 Savita. Evidence on record does not show that PW2 Savita is on inimical terms with the appellant/accused. She is neighbour of the appellant/accused. Evidence on record also shows that Sunita Nemoor is leader of the local ladies. In Indian setting, it does not stand to reason that PW2 Savita, who is not having any inimical disposition against the appellant/accused, would falsely implicate him in the offence of aggravated penetrative sexual assault on her teen aged daughter, at the instance of Sunita Nemoor. The said incident reflects on chastity of her teen aged daughter which may harm the prospects of marriage, apart from damage to the honour of the family. Hence, it is not possible to accept the defence version that the appellant/accused is falsely implicated in the crime in question.

13 Evidence of the PW1/victim female child is consistent and cogent. The same is corroborated by the medical evidence adduced by the prosecution on record. Version of the PW1/victim female child is not shattered in the cross-examination. Two

omissions on inconsequential aspects of the matter do not affect testimony of the PW1/victim female child. Her evidence goes to show that the appellant/accused had put his penis in her mouth and had discharged semen. Thereafter, he took pinches at her chest and had bitten on her cheeks. Subsequently, the appellant/accused indulged in lip-lock with the PW1/victim female child and during the course of that act, discharged gutkha in her mouth. When the testimony of the PW1/victim female child is not suffering from any infirmity and is found to be trustworthy, other inconsequential aspects, such as delayed medical examination of the PW1/victim female child as well as belated recording of her statement cannot be made capital of. The trauma suffered by the PW1/victim female child because of the acts of the appellant/accused justifies late recording of her statement by the Investigator. As her version is fully corroborated by the medical evidence on record, belated recording of her statement cannot give inference that the Investigator was deliberately taking time to bolster up the prosecution case.

14 Evidence of the PW1/victim female child is gaining corroboration from version of PW3 Pallavi Basutkar. This witness has disclosed utterances of the PW1/victim female child made soon after the incident and those are admissible in view of provisions of Section 157 of the Evidence Act. PW3 Pallavi Basutkar has proved former statement of the PW1/victim female child to the effect that the appellant/accused had inserted his penis in her mouth. This evidence certainly corroborates the version of the PW1/victim female child. Disclosure of the incident to her mother PW2 Savita and evidence of PW2 Savita to the effect that her daughter i.e. the PW1/victim female child had disclosed to her that the appellant/accused had put his penis in her mouth, corroborates the version of the PW1/victim female child.

15 No doubt, PW2 Savita has not deposed about the incident in proper sequence, but it needs to be kept in mind that she is a rustic and illiterate woman, earning her livelihood by working as a maid servant. She might not have recollected the

incident in proper sequence after passage of time of about 3 to 4 months because of her inadequate intellectual capacity to recollect the incident. However, that by itself, is not sufficient to doubt the prosecution case.

16 The prosecution has not examined Sunita Nemoor as well as father of the PW1/victim female child. However, when available evidence is sufficient to hold that the prosecution has established guilt of the appellant/accused beyond all reasonable doubts, non-examination of some other witnesses though available, would not cast a shadow of doubt on the prosecution case.

17 So far as defence version coming from mouth of DW1 Poonam Asudeo is concerned, she happens to be sister of the appellant/accused. She deposed that their house comprised of one room admeasuring 7 x 8 feet, in which she along with the appellant/accused, his wife and their parents used to reside. She further deposed that Sunita Nemoor had obstructed construction

of Ganpati temple by the appellant/accused. She further deposed that on the day of the alleged incident, she was present in her house and no such incident had happened. In the light of positive evidence of the PW1/victim female child, this interested version cannot be acted upon. The PW1/victim female child had no reason to depose a lie against the appellant/accused. As such, in foregoing paragraphs, evidence of the PW1/victim female child is corroborated by the medical evidence adduced by the prosecution on record. Hence, the interested version of the defence witness cannot be accepted.

18 In view of the foregoing discussion, the prosecution has established that the appellant/accused had committed aggravated penetrative sexual assault on the PW1/victim female child by putting his penis in her mouth. He had applied criminal force on the PW1/victim female child by putting his lips on her lips and by discharging gutkha in her mouth. This act, certainly, reflects sexual intent. The PW1/victim female child has deposed about threats extended by the appellant/accused to her in order to

prevent disclosure of his acts by her. Thus, guilt of the appellant/accused for offences punishable under Section 6 of the POCSO Act as well as under Sections 354 and 506 of the Indian Penal Code is duly proved. The appellant/accused is rightly sentenced to suffer rigorous imprisonment for 10 years which is minimum punishment prescribed for the offence proved to have been committed by him. Hence, the sentence imposed on the appellant/accused is also proper.

19 In the result, the appeal is devoid of merits, and therefore the order :

ORDER

- i) The Appeal is dismissed.
- ii) Consequentially, pending Criminal Application No.1254 of 2016 stands disposed of.

(A. M. BADAR, J.)

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