

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPEAL NO.887 OF 2014
WITH
CRIMINAL APPLICATION NO.1424 OF 2018
IN
CRIMINAL APPEAL NO.887 OF 2014**

SHRIDHAR KALU GATIR)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Ms.Farhana Shah, Appointed for the Appellants.

Mr.P.H.Gaikwad-Patil, APP for the Respondent – State.

CORAM : A. M. BADAR, J.

DATE : 5th OCTOBER 2018

ORAL JUDGMENT :

1 By this appeal, the appellant/accused is challenging the judgment and order dated 21st August 2014 passed by the learned Additional Sessions Judge, Nashik in Sessions Case No.61 of 2014 thereby convicting the appellant/accused of the offences

punishable under Section 376 of the Indian Penal Code as well as under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO Act' for the sake of brevity) and sentencing him to suffer rigorous imprisonment for ten years apart from payment of fine of Rs.10,000/- and in default of payment of fine to undergo further rigorous imprisonment for two years.

2 Brief facts leading to the prosecution of the appellant/accused can be summarized thus :

- (a) The appellant/accused is biological father of the victim girl, who is examined as P.W.No.2 during the course of trial. According to the prosecution case, she was studying in 5th Std. and her date of birth is 10/04/2003. At the time of the incident, she was residing along with her parents and brother at Ghoti in Igatpuri Taluka of Nashik District.
- (b) On 29/11/2013, she was sleeping along with her mother in the kitchen and the appellant/accused was sleeping in the

another room. At about 5.30 a.m. of that day, her mother woke up. She asked the victim/P.W.No.2 to sleep in the front room of the house and went for fetching the water. She returned after 15 to 20 minutes thereafter. At that time, her daughter viz. P.W.No.2 disclosed her that her father i.e. appellant/accused had committed forcible sexual intercourse with her. P.W.No.1 Mandabai, who happens to be mother of the victim girl/P.W.No.2, insisted for lodging the report with police. However, her daughter P.W.No.2 become frightened. The appellant/accused used to beat her as well as her daughter P.W.No.2, who happens to be the victim child. Therefore, P.W.No.1 Mandabai did not dare to lodge report against the appellant/accused. Ultimately, on 03/12/2013, she gathered courage to lodge the report and accordingly did so. On the basis of her report (Exhibit 12), Police Station, Ghoti registered Crime No.165 of 2013 for offences punishable under Sections 376 (2)(f), 323, 504 and 506 of the Indian Penal Code as well as under Section 4 of the POCSO against the appellant/accused.

- (c) Routine investigation followed and ultimately, the appellant/accused came to be charge-sheeted. The learned trial Court framed charge for offences punishable under Sections 376(2)(f), 323, 504 and 506 of the Indian Penal Code as well as under Section 4 of the POCSO against the appellant/accused.
- (d) In support of its case, the prosecution has examined in all six witnesses. First Informant/mother Mandabai is examined as P.W.No.1 whereas her daughter, who is victim of the crime in question is examined as P.W.No.2. Panch witness Dashrathsingh is examined as P.W.No.3. Village Development Officer Hari Kalu Suryavanshi is examined as P.W.No.4 for proving date of birth of the victim child. Dr.Suresh Gholap, who had medically examined the victim child is examined as P.W.No.5. Investigating Officer Bhaskar Jadhav is examined as P.W.No.6. Reliance is also placed on documentary evidence of the prosecution. Defence of the appellant/ accused was that of total denial. After hearing the

parties, the learned trial Court was pleased to convict the appellant/accused of the offences punishable under Sections 376 of the Indian Penal Code as well as under Section 4 of the POCSO and he is sentenced accordingly as indicated in the opening paragraph of this Judgment.

3 I heard Ms.Farhana Shah, the learned appointed Advocate appearing for the appellant/accused. She vehemently argued that medical evidence is not supporting the case of prosecution so also the forensic evidence. The hymen of the victim girl was seen to be intact and the report of her medical examination goes to show that even her vagina was not admitting single finger. Therefore, evidence of the P.W.No.2/victim girl that the appellant/accused had committed forcible sexual intercourse with her is totally improbable. The learned Counsel relied on the Medico Legal Certificate at Exhibit 24. It is further argued that there is delay in lodging the FIR making the prosecution case suspect. It is further argued that the appellant/accused was not tolerating the misconduct of his son and used to scold his son.

Therefore, his wife has falsely implicated him in the crime in question.

4 The learned Additional Public Prosecutor supported the impugned Judgment and Order of conviction and resultant sentence by contending that if testimony of the victim of the crime in question is found to be trustworthy, then the conviction can safely be recorded and there is no need of corroboration to the version of the victim of the sexual offence.

5 I have carefully considered the rival submissions and also perused the Record and Proceedings including depositions of prosecution witnesses.

6 According to the prosecution case, the PW2/victim child at the relevant time was a minor female child, aged about 11 years. As such, it is incumbent on the part of the prosecution to prove age of the victim child in view of invocation of section 4 of the POCSO Act. For that purpose, the prosecution has examined

PW4 Hari Suryavanshi, Village Development Officer who was working as the Registrar under the Registration of Births and Deaths Act, 1969. This witness has proved birth certificate issued by the Registrar under the Registration of Births and Deaths Act, 1969. This certificate shows that the PW2/victim child was born on 10th April 2003. There is nothing in cross-examination of PW4 Hari Suryavanshi to disbelieve his version about the registration of birth of the PW2/victim child at the office of the Registrar declaring her date of birth as 10th April 2003. That apart, the PW2/victim child during the course of her examination disclosed her date of birth as 10th April 2003 and there is no cross-examination on this aspect. Her mother PW1 Mandabai during the course of her evidence has stated that the PW2/victim child, at the relevant time, was aged about 11 years and was studying in 5th Standard. This evidence also remained unchallenged. Thus, prosecution has established the fact that date of birth of the PW2/victim child is 10th April 2003. The incident in question took place on 29th November 2013. As such, at the time of the incident, the PW2/victim child was below 12 years of age.

7 Now let us examine whether the appellant/accused has committed the penetrative sexual assault on his own daughter who was below 12 years of age at the relevant time, making himself liable to penal consequences provided under Section 376 of the Indian Penal Code as well as under Section 4 of the POCSO Act. To establish this offence of penetrative sexual assault, prosecution is heavily relying on evidence of the PW2/victim child as well as that of her mother PW1 Mandabai. PW2/victim child has disclosed to her mother the manner in which the incident took place. As per her version, in the night intervening 28th November 2013 and 29th November 2013 she was sleeping with her mother. Her mother woke up in the morning. Her mother then went for filling the water at the school. The PW2/victim child further deposed that then she slept in another room called as “devghar”. While she was sleeping, her father came in that room, slept beside her, removed his clothes and also denuded her. Thereafter, her father inserted his private part into her private part. At that time, her father heard sound of some one coming and therefore, he left the place. Then her mother woke her up. She

was frightened. Hence, her mother made enquiry from her. She disclosed the incident to her mother PW1 Mandabai. The PW2/victim child further deposed that despite insistence of her mother to come to police station, she did not come to police station and told her mother that her father may kill them. Ultimately, on 3rd December 2013, her mother lodged the report and then she was referred to Rural Hospital, Ghoti, where she was medically examined. From cross-examination of this witness, it is brought on record that the incident took place when there was nobody in the house and even brother of the PW2/victim child had gone to school at that time. It is further brought on record that the appellant/accused used to scold and assault her brother Ghanshyam.

8 Careful scrutiny of evidence of the PW2/victim child does not show any reason to disbelieve her version. This child witness had deposed against her own biological father. There is nothing in cross-examination of this child witness to suggest even remotely that she was tutored by someone else to falsely implicate

her father in the crime in question. There was no reason for the PW2/victim child to falsely implicate her own father in such a serious offence. Scolding and assaulting her brother by her father by no stretch of imagination can constitute a reason for false implication of the father, and that too, in such a heinous offence. As such, the victim child, who is examined as PW2 by the prosecution, appears to be the witness of truth.

9 Evidence of the PW2/victim child is gaining corroboration from version of PW1 Mandabai, who deposed that on 29th November 2013 she asked the PW2/victim child to wake up. Thereafter, the PW2/victim child woke up and went in another room to sleep. PW1 Mandabai deposed that then she went to the school where she was working to fill the water. After returning home in half an hour she noticed her daughter PW2/victim child in frightened condition. Upon enquiring, her daughter disclosed her about forcible sexual intercourse by the appellant/accused. PW1 Mandabai further deposed that her frightened daughter refused to go to the police station. She

deposed that on 2nd December 2013, the appellant/accused assaulted her son. Then she lodged report Exhibit 12 against the appellant/accused. From cross-examination of this witness it is brought on record that her son was not in good company and therefore the appellant/accused used to scold him. She admitted the fact that as her son declined to bring bundle of beedi, the appellant/accused had beaten her son.

10 The incident in question is that of penetrative sexual assault by the father of the PW2/victim child. It involves honour of the family. Merely because the appellant/accused being a father had beaten his son for bad Company of his son, cannot provoke his wife to lodge such a report which can even damage prospect of marriage of the PW2/victim child of the couple. Therefore, the alleged beating to his son by the appellant/accused is not sufficient to dislodge version of mother of the PW2/victim child. Evidence of PW1 Mandabai which is disclosing narration sby the PW2/victim child regarding the incident and that too soon after the incident, implicating the appellant/accused as

perpetrator, are relevant and admissible under Section 157 of the Evidence Act. Evidence of PW1 Mandabai as such, is corroborating the version of the PW2/victim child regarding penetrative sexual assault. The prosecution has also adduced medical evidence regarding the incident in question by examining PW5 Dr.Suresh Gholap, Medical Officer, working with Rural Hospital. This witness had medically examined the PW2/victim child on 3rd December 2013. The incident in question allegedly took place on 29th November 2013. This Medical Officer has noticed that there was redness on vaginal orifice of the PW2/victim child. Accordingly, he issued Medico Legal Certificate which is at Exhibit 24. The defence has declined to cross-examine this witness. In answer to the court question, this Medical Officer has stated that in cases of child, as vulval size is small, because of incomplete penetration hymen can be intact. This, medical evidence adduced by the prosecution reflects that there was redness on vaginal orifice of the PW2/victim child. In order to make out the offence punishable under Section 376 of the Indian Penal Code as well as under Section 4 of the POCSO Act, complete penetration is not

required. Slightest penetration is sufficient to constitute the offence of rape or penetrative sexual assault. Evidence of the PW2/victim child coupled with medical evidence on record does indicate penetration. In this view of the matter, it cannot be said that the prosecution has failed to prove the offence punishable under Section 376 of the Indian Penal Code so also under Section 4 of the POCSO Act.

11 The learned counsel for the appellant/accused placed reliance on judgment in the matter of **Manbir Kami @ Bishwakarma vs. State of Sikkim**¹ wherein the Honourable Orissa High Court was pleased to acquit the appellant therein by giving benefit of doubt. However, in the case in hand, clinching evidence of the PW2/victim child coupled with the medical evidence on record, demonstrate penetration and merely because hymen of the PW2/victim child was not found ruptured, it cannot be said that she was not subjected to the penetrative sexual assault.

1 (2016) 168 AIC 556

12 So far as quantum of sentence is concerned, the learned trial court has awarded sentence of rigorous imprisonment for 10 years for the offence punishable under Section 376 of the Indian Penal Code as well as under Section 4 of the POCSO Act apart from imposition of fine of Rs.10,000/- and default sentence of 2 years. The sentence imposed upon the appellant/accused is also proportionate to the offence held to be proved against him. In this view of the matter, the appeal is devoid of merits and therefore, the order :

ORDER

- i) The appeal is dismissed.
- ii) In view of disposal of the appeal, Criminal Application No.1424 of 2018 also stands disposed off.

(A.M. BADAR, J.)

**Arti Vilas
Khatate**

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