

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPEAL NO.1175 OF 2015
WITH
CRIMINAL APPLICATION NO.965 OF 2016
IN
CRIMINAL APPEAL NO.1175 OF 2015**

Ramkrupal Sukhram Rajput,
Aged : 24 Years,
R/at Institute of Hollistic Health Science,
Bhavans Collage Campus,
Andheri (W), Mumbai.
(At present is in Mumbai prison)

...Appellant

V/s.
The State of Maharashtra
D.N.Nagar Andheri West

....Respondent

Mr. Ganesh Bhujbal, Appointed Advocate for the Appellant.
Mr. S.V. Gavand, APP for the Respondent/State.

CORAM : A.M.BADAR, J.

DATED : 12th DECEMBER 2018

ORAL JUDGMENT:

1. By this appeal, the appellant/accused is challenging the Judgment and Order dated 10.12.2015 passed by the learned Designated Court under Protection of Children from Sexual Offences Act, 2012, for Greater Bombay in POCSO Special Case No.737 of 2013. By this impugned judgment and order, the appellant/accused is convicted of the offences punishable under Sections 376 and 342 of the Indian Penal Code as well as under

Section 4 of the POCSO Act. For the offence punishable under Section 342 of the Indian Penal Code, the appellant/accused is sentenced to pay fine of Rs.500/- and in default to undergo simple imprisonment for one month. For the offence punishable under Section 4 of the POCSO Act, he is sentenced to suffer rigorous imprisonment for seven years apart from direction to pay fine of Rs.1,000/- and in default to undergo simple imprisonment for two months. No separate sentence is imposed on the appellant/accused for the offence punishable under Section 376 of the Indian Penal Code in view of provisions of Section 42 of the POCSO Act. Similarly, he is also directed to pay compensation of Rs.25,000/- to the victim of the crime in question. In default thereof, he is directed to undergo further imprisonment for one year.

2. Facts in brief leading to the prosecution of the appellant/accused and the resultant conviction and sentence can be summarized thus:

(a) The victim of the crime in question is the female child/PW1, who at the relevant time was 17 years and 2 months old. She used to reside with her maternal aunt/PW2 Sangeeta Dahivalkar and other family members of her maternal aunt near Gamdevi Ganesh Mitra Mandal, Andheri, Mumbai. The victim female child/PW1 was taking education in 12th Std. at the Bhavans College, Andheri, Mumbai. For earning livelihood, simultaneously she was working as

Housekeeper with the institute of Holystic Health Science (hereinafter referred to as the Institute for the sake of brevity) situated in the premises of the Bhavans College, Andheri, Mumbai. The appellant/accused used to serve the said Institute as Therapist and he used to stay at the Institute itself in order to render services for 24 hours. The said Institute was run by Dr. Uday Choutai. Other employees such as PW4/ Dr. Bhairavi Kothari, Dr. Bharti Badre, Prachi etc. were also working in the said Institute. Working hours of the victim female child were 8.00 a.m. to 10 a.m. and 4.00 p.m. to 7.00 p.m.

(b) The incident in question took place after 8.00 p.m. of 06.06.2013 in the cabin of Dr. Uday Choutai. On that day, some friends of Dr. Uday Choutai visited him in the evening hours. They all along with Dr. Uday Choutai left the Institute at about 8.00 p.m. Thereafter, the victim female child/PW1 was leaving the office by switching off the lights of the cabin of Dr. Uday Choutai. At that point of time, the appellant/accused caught hold of the victim female child/PW1, put her on the bed in the cabin which was meant for examination of the patient. He denuded her and committed rape on her by putting condom. The victim female child/PW1 tried to save herself from clutches of the appellant/accused, but in vain. When the appellant/accused after finishing the act went to the bathroom, she escaped and

went to her house. Her maternal aunt/PW2 Sangeeta Dahivalkar found her in disturbed condition.

(c) On the next day i.e. on 07.06.2013, the victim female child/PW1 attended her duty at the Institute as usual, but the thoughts of yesterdays incident were haunting her mind. In a depressed condition, she consumed phenyl. PW4/Dr. Bhairavi Kothari noticed her in frightened condition. Upon being asked, the victim female child/PW1 informed her about the incident of penetrative sexual assault committed on her by the appellant/accused a day before as well as the fact of the consumption of phenyl by her. PW4/Dr. Bhairavi Kothari then immediately took the victim female child/PW1 to the Criticare Hospital, where PW3/Dr. Prasenjeet Bele gave some first-aid to her. The victim female child/PW1 was then taken to the Cooper Hospital where she was examined and treated by PW5/Dr. Anup Kumat.

(d) Statement of the victim female child/PW1 came to be recorded by PW12/Ramesh Revankar, PSI on 07.06.2013 and accordingly, Crime No.283/2013 for the offences punishable under Sections 342, 376 of the Indian Penal Code and under Section 4 of the POCSO Act came to be registered at the D.N.Nagar Police Station, Mumbai.

(e) During the course of investigation, statement of witnesses came to be recorded. Spot was inspected. Clothes of the victim female child/PW1 as well as the appellant/accused came to be seized. On the basis of voluntary disclosure statement of the appellant/accused, his underwear came to be seized. On completion of routine investigation, the appellant/accused came to be charge-sheeted.

(f) Charge for the offences punishable under Sections 342 and 376 of the Indian Penal Code as well as under Section 4 of the POCSO Act came to be framed and explained to the appellant/accused. He pleaded not guilty and claimed trial. In order to bring home the guilt to the appellant/accused, the prosecution has examined in all twelve witnesses.

(g) Defence of the appellant/accused was that of total denial. As per the defence version, the victim female child/PW1 was having one sided love with the appellant/accused. She insisted the appellant/accused to marry her. The appellant/accused asked for time. Thereupon, even Dr. Uday Choutai had given understanding to the victim female child/PW1. However, she lodged the FIR against the appellant/accused and that is how he is falsely implicated.

(h) After hearing the parties, the learned trial Court was pleased to hold that the prosecution has successively proved offences punishable under Section 346 of the Indian Penal Code as well as under Section 4 of the POCSO Act against the appellant/accused and he is accordingly sentenced as indicated in the opening paragraph of this judgment.

3. I heard Shri. Bhujbal, the learned advocate appointed to represent the appellant/accused at the cost of the State. By taking me through the entire Record and Proceedings, Shri. Bhujbal pointed out the fact that in cross-examination, the victim female child/PW1 has accepted the fact that she was having one sided love for the appellant/accused. He argued that cross-examination of the victim shows that the appellant/accused never misbehaved with any of his female colleague. The learned counsel pointed out that cross-examination of the appellant/accused shows that in the vicinity of the Institution, there was canteen, photocopy shop, hospital etc. and watchman of the Bhavans College used to remain present in the premises throughout. It is further argued that medical evidence is not supporting the case of penetrative sexual assault. With this, it is submitted that the impugned judgment and order of conviction and resultant sentence needs to be quashed and set aside.

4. The learned APP supported the impugned judgment and order of conviction and resultant sentence.

5. I have carefully considered the submissions so advanced and also perused the Record and Proceedings including oral as well as documentary evidence. Evidence on record reflects some undisputed facts. It is not in dispute that the victim female child/PW1 at the relevant time was aged about 17 years and two months i.e. below 18 years of age. Undisputedly, she was taking education in Bhavans College and was simultaneously serving in the Institute where the appellant/accused was a full time Therapist. With this undisputed position, let us examine evidence of the victim female child/PW1.

6. In tune with the prosecution case, she deposed that on 06.06.2013 she worked in the Institute till 7.00 p.m. and then she was told by Dr. Uday Choutai that his friends are coming. She, therefore, waited to serve tea. As per her version, at about 8.00 p.m. Dr. Uday Choutai and his friends left. Then she was switching off the lights of the Institute. At that time, the appellant/accused caught her hand and pulled her to the cabin of Dr. Uday Choutai. He then put her on the bed in that cabin meant for examination for the patient, removed her clothes and committed penetrative sexual assault on her by putting condom. She was overpowered by the appellant/accused. She stated that then the appellant/accused went to the bathroom and she escaped. The victim female child/PW1 further deposed that because of thoughts of the sexual assault on her, she could not sleep

in that night and on the next day she attended the duty at 8.00 a.m. However, as thoughts of sexual assault on her were coming to her mind and as she was frightened, she consumed phenyl. Then she had vomiting sensation. After vomiting, her throat was burning. She then told about consumption of phenyl to PW4 Dr. Bhairavi Kothari, so also disclosed the incident which took place on a day earlier to her.

7. Version of victim female child/PW1 is fully corroborated by version of PW4 Dr. Bhairavi Kothari, who was also an employee of the Institute. As per version of PW4 Dr. Bhairavi Kothari, on 07.06.2013 when she as well as the victim female child/PW1 were at the Institute, she noticed victim female child/PW1 in frightened condition, and therefore, asked her as to what is the matter. As stated by PW4/Dr. Bhairavi Kothari, the victim female child/PW1 told her that a day earlier, the appellant/accused had committed forcible sexual intercourse with her and because of that, she consumed phenyl. As testified by PW4/Dr. Bhairavi Kothari, she then took the victim female child/PW1 to the Criticare Hospital where PW3/Dr. Prasenjeet Bele treated her.

8. It is in evidence of PW3/Dr. Prasenjeet Bele, the medical officer of Criticare Multispeciality Hospital that on 07.06.2013, the victim female child/PW1 was brought to the hospital by PW4/Dr. Bhairavi Kothari. This witness stated that being a Medico Legal Case, he gave intimation of the incident to

the D.N.Nagar Police Station. He has also stated that the victim had given history of sexual molestation. She was then taken to the Cooper Hospital for further management.

9. PW5/Dr.Anup Kumar, a resident doctor at the Cooper Hospital has deposed that on 07.06.2013, the victim female child/PW1 was brought by police constable of D.N.Nagar Police Station with a history of sexual assault. As per version of this witness, he noted down the history of sexual assault with patient of an unknown person at the workplace on 06.06.2013. He then conducted medical examination and found that hymen of the victim female child/PW3 was not intact. There was no injury over vagina, nor there were signs of use of force on the victim female child/PW1. PW5/Dr.Anup Kumat deposed that the findings in his examination of the patient were consistent with the history given by the patient.

10. On this backdrop, it is in evidence of PW2/Sangeeta Dahivalkar, the maternal aunt of the victim female child/PW1 that on 06.06.2013, the victim female child/PW1 returned from the workplace in disturbed condition, complained about pain in abdomen and did not take food. PW2/Sangeeta Dahivalkar further deposed that on 07.06.2013, she received a call from Dr. Uday Chautai and therefore she went to the Cooper Hospital where the victim female child/PW1 disclosed her that the appellant/accused had committed rape on her on 06.06.2013.

This witness has also spoken about the fact of consumption of phenyl by the victim due to the said reason.

11. The question which falls for consideration is whether evidence of the victim female child/PW1 about forceful penetrative sexual assault on her by the appellant/accused is reliable in the light of the fact that attending medical officer PW5/Dr. Anup Kumat of Cooper Hospital did not notice any external or internal injury on the victim, nor he had spoken about the fact whether the hymen was having fresh tears or it was ruptured in the past. On this aspect, the law is clear. The conviction of the perpetration of the crime in such cases can be based even on uncorroborated testimony of the victim.

12. It is a settled legal position that the medical evidence is also a corroborative piece of evidence but where the medical evidence does not support the otherwise clinching and trustworthy ocular evidence of any material witness then, the testimony of such ocular evidence will prevail on the medical opinion and not vice versa. In the case of *Ranjit Hazarika v. State of Assam*, reported in (1998) 8 SCC 635, the opinion of the doctor was that no rape appeared to have committed because of the absence of rupture of hymen and injuries on the private part of the prosecutrix, the Apex Court took a view that the medical opinion cannot throw over board an otherwise cogent and trustworthy evidence of the prosecutrix. Relevant paragraph of the said judgment is

reproduced as under:-

6. *The evidence of the prosecutrix in this case inspires confidence. Nothing has been suggested by the defence as to why she should not be believed or why she would falsely implicate the appellant. We are unable to agree with the learned counsel for the appellant that in the absence of corroboration of the statement of the prosecutrix by the medical opinion, the conviction of the appellant is bad. The prosecutrix of a sex offence is a victim of a crime and there is no requirement of law which requires that her testimony cannot be accepted unless corroborated. In State of Punjab v. Gurmit Singh [(1996) 2 SCC 384 : 1996 SCC (Cri) 316 : (1996) 1 Scale 309] to which one of us (Anand, J.) was a party, while dealing with this aspect observed: (SCC pp. 395-96, para 8) "The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. 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 necessitate 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? The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable."

The apex court in *B.C. Deva v. State of Karnataka*, reported at (2007) 12 SCC 122, in spite of the fact that no injuries were found on the person of the prosecutrix, yet finding her version to be reliable and trustworthy, the Apex Court

upheld the conviction of the accused. The Court observed that :

"18. The plea that no marks of injuries were found either on the person of the accused or the person of the prosecutrix, does not lead to any inference that the accused has not committed forcible sexual intercourse on the prosecutrix. Though the report of the gynaecologist pertaining to the medical examination of the prosecutrix does not disclose any evidence of sexual intercourse, yet even in the absence of any corroboration of medical evidence, the oral testimony of the prosecutrix, which is found to be cogent, reliable, convincing and trustworthy has to be accepted."

13. The defence has attempted to bring on record the fact that the victim female child/PW1 was habituated to sexual intercourse. It was put to her that when the appellant/accused caught her, she was outside the cabin of Dr.Uday Choutai. It was suggested to her that in an attempt to rescue herself, there was a scuffle between her and the appellant/accused. It was suggested to her that she was trying to resist the appellant/accused by using force and had even slapped the appellant/accused. It was suggested to her that she became angry because of the incident and by thinking of commission of suicide, she consumed phenyl. The victim female child/PW1 admitted in the cross-examination that she was having one sided love for the appellant/accused. However, she denied the suggestion that she was insisting him to marry her.

14. The sequence of events which are brought on record from cross-examination of the victim female child/PW1, so also evidence regarding post-event happening coming from mouth of PW4/Dr.Bhairavi Kothari, PW3/Dr. Prasenjeet Bele and PW5/Dr.Anup Kumat unerringly points out that the incident of penetrative sexual assault on the victim female child/PW1 in fact took place in the evening hours on 06.06.2013. Else there was no reason for the victim to consume phenyl. Even it is assumed that the victim female child/PW1 was having one sided love for the appellant/accused, then also theory of consensual sex is of no avail to the appellant/accused. The victim female child/PW1 has categorically deposed about her date of birth by stating that she was born on 22.04.1996. Her S.S.C.Certificate at Exhibit 11 reflects that she was born on 22.04.1996. This evidence is not disputed by the appellant/accused. This makes it clear that the victim female child/PW1 at the time of commission of the act of the penetrative sexual assault was less than 18 years of age. Thus, she had not attained the age of consent and as such even if it is assumed that she had submitted her chastity to the appellant/accused because of one sided love for him still the offence of penetrative sexual assault is made out.

15. PW12/Ramesh Revankar, PSI had drawn Spot Panchnama of the incident which is at Exhibit 33 in presence of Panch Witness PW9/Arvind Singh. Two bottles of phenyl apart from one bed-sheet was also seized vide this panchnama. Perusal of the Spot

Panchnama shows that in the cabin of Dr.Uday Choutai, there was a wooden bed with mattress. This situation prevailed on the spot fully corroborates the version of the victim female child/PW1 regarding the incident.

16. The prosecution has also adduced evidence of recovery of underwear at the instance of the appellant/accused on the basis of his voluntary disclosure statement Exhibit 30 recorded in presence of Panch Witness PW8/Mehboob Shaikh, so also that of seizure of clothes of the victim female child/PW1 in presence of Panch Witness Santhosh Darekar/PW10. However, forensic evidence on this aspect is not supporting the case of prosecution and as such it is not necessary to deal with this evidence.

17. In the result, no fault can be found in the impugned Judgment and Order of conviction as well as resultant sentence imposed on the appellant/accused by the learned trial Court. The appeal, as such, is devoid of substance and the same is dismissed.

18. In view of disposal of appeal, the Criminal Application No.965 of 2016 is disposed of.

(A.M.BADAR J.)