

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

909 CRIMINAL APPEAL NO.195 OF 2017

Mr.Umesh @ Bapu Khadtare
Age: 24 yrs., R/at – Nandeshwar,
Tq.Mangalwedha, Dist.Solapur,
At present Apsinga Road, Hadko,
Tuljapur, Tq.Tuljapur,
Dist.Osmanabad.

..Appellant
(Org. Accused)

VERSUS

1 State of Maharashtra
Through Police Station Officer,
Tuljapur, Tq.Tuljapur,
Dist.Osmanabad.

..Respondent
(Org. Complainant)

2 Prosecutrix through the Next
Friend Asst. Superintendent of the
Court, Osmanabad.

...
Advocate for Appellant : Smt. Rashmi Kulkarni
APP for Respondent – State : Shri S.M.Ganachari
...

CORAM : P.R.BORA, J.
DATE: 6th August, 2019

ORAL JUDGMENT :-

1. When the present Appeal is taken up for hearing, it is revealed that, the learned Special Court has granted compensation of Rs.40,000/- to the victim. In such circumstances, the victim is a necessary party in the present Appeal. It is brought to my notice that, as observed by the learned Special Court in paragraph 42 of the impugned

Judgment, since the mother of the victim i.e. PW-3 did turn hostile, the learned Trial Court has appointed the Assistant Superintendent of the Court, Osmanabad, as the next friend of the victim. In the present matter, the appellant is permitted to add the victim as the party respondent, through the Assistant Superintendent of the Court, Osmanabad. The notice of added respondent is waived by learned APP. The Appeal is, thus, ready for hearing.

2. With the consent of learned counsel appearing for the parties, heard finally.

3. The convict, in Special (POCSO) Case No.22 of 2016, which is decided on 15.12.2016, by the Special Judge, Osmanabad, has preferred the present Appeal.

4. The appellant has been convicted for the offence punishable under Section 376(2)(f) of the Indian Penal Code (IPC) and is sentenced to suffer rigorous imprisonment for ten years and to pay fine of Rs.20,000/-, in default, to undergo rigorous imprisonment for two years. The appellant has also been convicted for the offence punishable under Section 377 of the IPC and has been sentenced to suffer rigorous imprisonment for seven years and to pay fine of Rs.20,000/-, in default, to suffer rigorous imprisonment for two years. The appellant has also

been convicted for the offence punishable under Section 506 of the IPC and has been sentenced to suffer rigorous imprisonment for two years and to pay fine of Rs.2,000/-, in default, to suffer rigorous imprisonment for three months. The appellant, though has been convicted for the offence punishable under Sections 4 and 8 of the Protection of Children from Sexual Offences Act (POCSO), 2012, separate sentence has not been awarded, since the higher punishment, as provided under Section 376 (2)(f) of the IPC, has been imposed upon the appellant.

5. It was the case of the prosecution that, on 07.04.2016, when the victim girl, aged about nine years, was at home along with the accused, who happens to be her step father, he committed rape on her. The First Information Report (FIR) of the incident came to be lodged on second day of the said incident i.e. on 08.04.2016. On lodging of the FIR, the investigation was set in motion. The appellant was arrested and further investigation was carried out. The accused was charged for all the offences, for which he has been convicted. In order to bring home the guilt of the accused, prosecution examined total seven witnesses namely (i) prosecutrix (PW-1), Dr.Kiran Pravin Rochkari (PW-2), Sunita Umesh Khadtare (PW-3), Madhav Dnyanoba Gundile (PW-4), Ganpat Dhansing Jadhav (PW-5), Dr.Digvijay Pradip Kutwal (PW-6) and Amol Shahaji Jadhav (PW-7). The

defence of the accused was of total denial. From the facts, which have come on record through the cross-examination of the witnesses examined by the prosecution, the defence taken by the accused was that, somebody else other than the accused, has sexually abused the victim and at the instigation of her mother, the prosecutrix has falsely deposed against the accused before the Court.

6. The learned counsel appearing for the appellant - accused has assailed the impugned Judgment on various grounds. The learned counsel submitted that, the Trial Court has implicitly relied upon the testimony of the prosecutrix, which is full of contradictions. The learned counsel, taking me through the evidence of the prosecutrix before the Court, submitted that, in the cross-examination, the admissions which have been given by the prosecutrix, in fact are capable of nullifying the facts, which she has stated in her examination-in-chief. The learned counsel further submitted that, there is much variance in the contents of the FIR and the evidence of prosecutrix, adduced before the Trial Court. The learned counsel further submitted that, the story, which was put-forth while lodging the FIR, can not be said to have been substantiated by the prosecution though the evidence adduced before the Court. The learned counsel submitted that, the mother of the prosecutrix, who lodged the FIR, has not

supported the case of the prosecution. The learned counsel further submitted that, the medical evidence has also not been appropriately appreciated by the learned Trial Court. It is also contended that, the evidence, in the form of the report of the Chemical Analyzer, has been misinterpreted and misread by the learned Trial Court. The learned counsel submitted that, in fact that was the most weighing factor in the mind of the Trial Court for convicting the accused under Section 376(2)(f) of the IPC. The learned counsel, taking me through the discussion made by the Trial Court, as about the semen detected on article (Exhibit A-4) of the Blood Group 'AB', submitted that, the same was held to be in respect of the undergarment of the prosecutrix, whereas in fact the article (Exhibit A-4) was the undergarment of the accused. The learned counsel submitted that finding of the traces of semen or detection of semen spots on the undergarment of fully grown youth is a normal circumstance and that cannot be a reason for jumping to the conclusion that he has committed sexual assault on the victim girl when on the undergarment of the victim no such evidence was noticed.

7. The learned counsel further submitted that, though no evidence has come on record, as about unnatural sexual intercourse by the accused with the victim, the Court has convicted the appellant even for an offence under Section 377 of

the IPC. The learned counsel submitted that, from the discussion made by the Trial Court, there is reason to believe that, instead of looking into the evidence, the Court has preferred to rely upon the statement of the victim recorded by the Magistrate under Section 164 of the Code of Criminal Procedure. The learned counsel submitted that, if that statement is perused, it does not make out any case for an offence under Section 376(2)(f). The learned counsel submitted that, in any case, the circumstances, which have come on record, are so doubtful that, it was difficult for the learned Special Court to reach to any certain conclusion much-less to the conclusion that the appellant is guilty of committing rape on the prosecutrix.

8. The learned counsel further submitted that, having regard to the evidence which has come on record, though there may be a strong suspicion of involvement of the accused in commission of the alleged crime, that may not take the place of evidence, so as to convict him for the offence alleged against him. The learned counsel, in the circumstances, prayed for setting aside the impugned Judgment and acquit the accused from all the charges leveled against him.

9. In the alternative, it was submitted by the learned counsel that, the evidence which has come on record, certainly is not

enough to reach to any conclusion that, the accused had penetrative sexual intercourse with the victim girl. The learned counsel submitted that, if the contents of the FIR, statement of the victim recorded under Section 164 of the Code of Criminal Procedure, oral evidence before the Court and the medical evidence are conjointly read, it appears that an attempt was made by the accused to have penetrative sexual intercourse with the victim girl, however, he did not proceed further and that is the reason that the injuries which are noticed on private part of the prosecutrix are minor and hymen of prosecutrix is found intact. The learned counsel submitted that, had the accused committed forcible sexual intercourse with the prosecutrix, the injuries must have been grave and serious.

10. The learned counsel further submitted that, though in the FIR other two children of the accused were stated to be present in the house at the relevant time, in the entire further case of the prosecution, there is absolutely no reference of the said children namely Rajkumar and Rajkumari. The learned counsel submitted that, the said fact has also created reasonable doubt about the story put-forth by the informant in the FIR and by prosecutrix in her testimony before the Trial Court.

11. The learned counsel relied upon the Judgment in the case

of ***Panchhi and others Vs. State of U.P. [(1998) 7 Supreme Court Cases 177]*** and more particularly, invited my attention to the discussion made in paragraphs 11 and 12 of the said Judgment to buttress her contention as about the credibility of the facts stated by the child witness before the Court. The learned counsel submitted that the possibility of tutoring is always on higher side in case of child witnesses. The learned counsel pointed out that, in the cross-examination the prosecutrix has even admitted that, the statement given by her before the Magistrate, was as per instructions given by her mother. The learned counsel, in the circumstances, submitted that, the benefit of doubt would certainly go in favour of the accused.

12. The learned counsel also relied upon the ***Judgment in Criminal Appeal No.253 of 2003 delivered by this Court on 25.07.2017, in the case of Bajeya Nareya Padvi Vs. The State of Maharashtra and another***, to canvass that, the conviction cannot be granted and maintained on sole testimony of the child witness and some corroboration is mandatory in such matters.

13. In so far as the appreciation of medical evidence is concerned, the learned counsel placed her reliance on the Judgment delivered by the Division Bench of this Court in the case of ***Ajmoddin Babu Tamboli Vs. State of Maharashtra [2013 ALL MR (Cri) 1421]***.

14. The learned counsel further submitted that, the medical examination of the accused also indicates that, he did not have forcible sexual intercourse with the prosecutrix. The learned counsel submitted that, infact the conclusions recorded by the Trial Court indicate that the Trial Court itself was not sure about the acts alleged against the accused, whether would amount to an offence under Section 376(2)(f), or would fall in the category of an offence as prescribed under the POCSO Act. The learned counsel submitted that, in the worst situation, even if the evidence on record as it is accepted, the offence, which can be said to have been proved against the accused would be under Section 8 of the POCSO Act and not beyond that. The learned counsel, in the circumstances, has alternatively prayed for passing an appropriate order. The learned counsel submitted that, the accused is behind the bars w.e.f. 08.04.2016 i.e. from the date of his arrest. The learned counsel, in the circumstances, has prayed, firstly for recording clean acquittal of the accused and in the alternative, to hold the accused guilty not beyond the offence punishable under Section 8 of the POCSO Act.

15. Shri S.M.Ganachari, learned APP supported the impugned Judgment. The learned APP submitted that, the testimony of the prosecutrix inspires full confidence and in such circumstances, there was no requirement of any other corroborative evidence

and guilt of the accused must be held to have been proved on the statement of the prosecutrix alone. The learned APP submitted that, though it has been contended on behalf of the appellant that, several damaging admissions are given by the prosecutrix in her cross-examination, the cross-examination and the examination-in-chief will have to be read as a whole. The learned APP submitted that, the age of the prosecutrix cannot be ignored. The learned APP further submitted that, in so far as the core fact is concerned, the same has been clearly stated by her before the Court and the same has remained undisturbed even in her cross-examination. The learned APP submitted that, the statement recorded of the prosecutrix and the first informant mother of the prosecutrix under Section 164 of the Code of Criminal Procedure, would also have to be taken into account, while considering the merit of the matter. The learned APP submitted that, the mother of the prosecutrix may have turned hostile, while deposing before the Court, the cross-examination shows that, she has admitted that her statement was recorded under Section 164 of the Code of Criminal Procedure. The learned APP submitted that, the evidence, which has come on record undoubtedly proves the guilt of the accused for commission of offence under Section 376(2)(f) of the IPC and since the victim is a minor girl and the accused happens to be

her step father, the accused is liable to be punished under Section 376(2)(f) of the IPC and has been rightly convicted by the Trial Court for the said offence. The learned APP, in the circumstances, prayed for dismissal of the Appeal.

16. I have given due consideration to the submissions advanced by the learned counsel for the appellant and the learned APP appearing for the State. I have perused the impugned Judgment as well as the evidence on record.

17. The Special Court has convicted the appellant for the offence punishable under Section 376(2)(f) as well as Section 377 of the IPC. After having considered the evidence on record and more particularly, the testimony of the prosecutrix before the Court, as well as the medical evidence, there appears substance in the argument advanced on behalf of the appellant that there is no evidence against the accused to hold him guilty for the offence under Section 377 of the IPC. In her statement recorded under Section 164 of the Code of Criminal Procedure, though the prosecutrix had stated that the accused had unnatural sexual intercourse with her, in her testimony before the Court, she has not stated anything about unnatural sexual intercourse. Even the medical evidence does not suggest the possibility of commission of anal intercourse by the accused with

the prosecutrix. The finding recorded by the learned Special Court holding the accused guilty even for the offence under Section 377 of the IPC, thus appears to be not supported by any evidence. The finding recorded in that regard, has to be therefore, set aside and it is accordingly set aside.

18. In so far as the allegation against the accused that, he did commit sexual intercourse with the victim is concerned, the evidence of the prosecutrix will have to be first scrutinized. On perusal of the testimony of the prosecutrix, it reveals that, sufficient particulars are provided by the prosecutrix in her examination-in-chief, indicating that the accused tried to have sexual intercourse with her. Though, it has been vehemently argued by the learned counsel appearing for the appellant that, in the cross-examination, the prosecutrix has given the admissions, which have completely nullified her version in the examination-in-chief, I am unable to accept the submission so made. Admittedly, the prosecutrix is a small girl aged about nine years and it is not expected that, she will understand the import and the intention behind every question put to her in the cross-examination. Though, it is stated that she has accepted all suggestions, the said circumstance, according to me, is indicative of the fact that prosecutrix is incapable of understanding import of the questions, put to her in her cross-

examination. It is also revealed that, a question was put to her in the cross-examination that, she has falsely sated that the accused had sexual intercourse with her, the prosecutrix answered the said question in negative.

19. It appears to me that the evidence of the prosecutrix if read as a whole, leads to the conclusion that the acts which were committed by the accused with the prosecutrix, were amounting to sexual abuse of the prosecutrix by him. The medical evidence sufficiently corroborates the version of the prosecutrix. The entire evidence of Medical Officer Dr.Kiran Pravin Rochkari (PW-2) need not be discussed; suffice it to refer the observations made in the report that, injuries noticed on person of the prosecutrix and more particularly, in labia majora were supporting the allegation that, she was subjected to sexual intercourse. Having considered the evidence of the prosecutrix, which according to me, inspires confidence, though several other aspects are argued by learned counsel for the appellant and by learned APP, I do not find it necessary to record all those submissions.

20. In the present case, I find testimony of the prosecutrix trustworthy and dependable. It is sought to be contended by learned counsel appearing for the appellant that, the evidence of the mother of prosecutrix creates reasonable doubts about the

presence of the accused in the house, when the alleged incident is stated to have occurred. My attention was invited to the suggestion given to the prosecutrix that, it was not the accused but somebody else who abused her. It is true that, the prosecutrix answered the said question in affirmative. However, the truth comes out through many ways. The accused has taken a defence, while cross-examining the prosecutrix, suggesting that, when the alleged incident had happened, he was not at home. In his statement under Section 313 of the Code of Criminal Procedure, he has, however, categorically stated that on the date of the incident, the prosecutrix and he were at home. It has come on record that, the house where the alleged incident is stated to have occurred, is consisting of one room, having no compartment. In the circumstance, it is difficult to accept that, while the father of the victim was present in the house, someone would enter into the house and abuse the prosecutrix. Though it is assumed that, the accused was under the influence of alcohol, even then in that condition he would not have allowed any outsider or unknown person to enter into his house and sexually abuse his daughter. The defence raised by the appellant that some unknown person sexually abused the prosecutrix, therefore, appears without any substance and has to be rejected. If the aforesaid possibility is ruled out, there remain no doubt

that it was the accused and accused alone, who did commit sexual assault on the prosecutrix.

21. The next question which arises for consideration is, from the evidence, which has come on record, whether the accused can be held guilty for the offence under Section 376(2)(f) of the IPC. After having scrutinized the entire evidence on record and more particularly, the medical evidence, certain doubts are raised, as about the conclusion recorded by the Trial Court, holding the accused guilty for the offence under Section 376(2)(f) of the IPC. Medical evidence clearly indicates that, hymen of the prosecutrix was intact. In the Judgment relied upon by the learned counsel appearing for the appellant, which has been delivered by the Division Bench of this Court in the case **Ajmoddin Babu Tamboli** (supra), not exactly same but alike situation was considered and finding has been recorded that, in case of penetrative sexual assault on a child of tender age, the injuries which may appear on the private part of the victim, as well as on the private part of the offender, will be certainly of grave nature.

22. In the present matter, even if the statement of the prosecutrix and the statement of the mother of the prosecutrix are considered, it appears that though the prosecutrix has stated

about sexual assault by the accused on her, the allegation seems to be restricted only to the extent of an attempt. From the evidence, which has come on record, it is difficult to record any finding that, the accused did have penetrative sexual intercourse with the prosecutrix. The undergarment on which semen was detected has been wrongly presumed by the Trial Court to be of the prosecutrix, whereas it was the undergarment of the accused. After having perused the relevant document, there has remained no doubt that the Trial Court has recorded incorrect finding in that regard. Undergarment on which the semen was detected was of blood group 'AB', which was infact the undergarment of the accused and not of the prosecutrix. As noted herein above, noticing of semen presuming the same to have been noticed on undergarment of prosecutrix, the conclusion was recorded by the Trial Court that, it was indicative of penetrative sex. If the aforesaid evidence is ignored, there is no other evidence to hold that, the accused did have penetrative sexual intercourse with the prosecutrix. From the evidence which has come on record, it is discernible that, an attempt was certainly made by the accused, however, the said evidence falls short for holding the accused guilty of an offence punishable under Section 376(2)(f) of the IPC. Considering the testimony of the prosecutrix, the medical evidence and the pathological

reports, it appears to me that, the offence which can be held to be proved against the accused is only under Section 8 of the POCSO Act. I accordingly hold the accused guilty for the said offence. Needless to state that, in absence of any conclusive evidence, the finding recorded by the Trial Court holding the accused guilty for the offence punishable under Section 376(2)(f) of the IPC is liable to be set aside and it is accordingly set aside.

23. For the reasons stated as aforesaid, I hold the accused guilty only for the offence under Section 8 of the POCSO Act. The minimum sentence provided for such an offence is rigorous imprisonment of three years and the maximum is rigorous imprisonment of five years. In the present matter, though it was strenuously urged by the learned counsel for the appellant that, there are several mitigating circumstances, making out the case for showing leniency to the accused, while awarding the punishment, I am not convinced with the submission so made. Sexual assault by a father on a daughter has to be viewed seriously. No leniency can be shown in such matters. For the reasons stated above, the following order is passed:-

ORDER

- I) Criminal Appeal is partly allowed.

II) The conviction recorded of the accused by the learned Trial Court for the offences punishable under Sections 376(2)(f) and 377 of the IPC is quashed and set aside. The accused is held guilty for the offence punishable under Section 8 of the POCSO Act and is sentenced to suffer rigorous imprisonment for five years and to pay fine of Rs.15,000/-, in default, to undergo rigorous imprisonment for six months.

III) If the fine amount is paid by the accused, the same shall be invested in the name of the prosecutrix for the period till she attains the age of majority, in any Nationalized Bank.

IV) The learned counsel appearing in the matter for the appellant was appointed as *Amicus Curiae*. While appreciating the efforts taken by the learned counsel, this Court quantifies the legal fees payable to her to the tune of Rs.10,000/-.

V) Registry shall forward a copy of the present Judgment to the accused who is undergoing sentence in Harsool Jail, Aurangabad.

VI) Accused is behind the bars since 08.04.2016. He will be entitled for set off under Section 428 of the Criminal Procedure Code, of the period already undergone by him against the substantive sentence imposed on him.

(P.R.BORA)
JUDGE