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***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION***

**CRIMINAL APPEAL NO.625 OF 2016
(THROUGH JAIL)**

Akshay Raghunath Patil,
Age about 24 years,
Convict Prisoner No.C/
(At present in Judicial Custody
at Kolhapur Central Prison.)
R/o. Mohare, Taluka Panhala,
District – Kolhapur.

...Appellant

Versus

The State of Maharashtra
Through Senior Inspector of
Police, Kodli Police Station
(Vide C.R.No.75 of 2014)

...Respondent

Ms.Yogita Deshmukh, Appointed Advocate for the Appellant.

Mr.P.H.Gaikwad, A.P.P. for the Respondent - State.

CORAM : REVATI MOHITE DERE, J.

DATE : 2nd APRIL, 2019

ORAL JUDGMENT :

1. The Appellant vide Judgment and Order dated 28th April, 2016, passed by learned Special Judge, Kolhapur, in Special Case (POCSO) No.50 of 2014, has been convicted and sentenced as under:-

- for the offence punishable under Section 376(2)(f) of the Indian Penal Code to suffer rigorous imprisonment for 10 years and to pay fine of Rs.10,000/- in default, to suffer rigorous imprisonment for 1 year;

The Appellant has however been acquitted of the offence punishable under Sections 4 and 6 of the Protection of Children from Sexual Offences Act, 2012 and under Section 506 of the Indian Penal Code.

2. The prosecution case in brief is as follows:-

The prosecutrix (PW4) is the niece of the Appellant i.e. the prosecutrix's mother and the Appellant are real brother and sister. According to the prosecution, the prosecutrix and her brother were dropped off by their mother to village Mohare i.e. to their grandparent's house, 7 to 8 years prior, and since then the prosecutrix and her brother were staying at Mohare. The whereabouts of prosecutrix parents were not known and the children were being raised by their grandparents. The prosecutrix, her brother, grandmother (PW5), grandfather, the Appellant, his brother – Deepak (PW2) and great grandmother of the prosecutrix were all residing together in the same house. The incident is alleged to have taken place on 7th July, 2014, in the afternoon. According to the prosecutrix, the Appellant

asked the prosecutrix to accompany him as he was going to the field to get fodder and told her that she could wash clothes in the canal. Accordingly, the prosecutrix, accompanied the Appellant to the field. In the field, the Appellant held her hands and told her “करुया काय” to which the prosecutrix said 'no'; that the Appellant removed her clothes as well as his and put his penis on her vagina and laid on her person; that the prosecutrix was crying and saying 'no'; that the Appellant got up and asked the prosecutrix to wear her clothes. It is alleged that thereafter, the prosecutrix went to wash the clothes and returned back and thereafter called her aunt i.e. PW10, who was residing at Kolhapur and told her that she wanted to come to Kolhapur. Accordingly, PW10 – maternal aunt of the prosecutrix asked PW2 – maternal uncle of the prosecutrix, to get the prosecutrix to Kolhapur. The prosecutrix on reaching Kolhapur disclosed the incident to PW10 – maternal aunt, after which the incident was also informed to PW5 - grandmother of the prosecutrix, pursuant to which, the prosecutrix lodged an FIR (Exhibit – 19). After investigation, charge sheet was filed as against the Appellant in the Court of the learned JMFC. Since the offence punishable under Section 376 of the Indian Penal Code was sessions triable, the case was committed to the Court of Sessions.

The learned Special Judge, Kolhapur, framed charge as against the Appellant, who pleaded not guilty and claimed to be tried.

The prosecutrix in support of his case examined 12 witnesses. PW1 – Dr.Mangesh Mane, the doctor who examined the Appellant ; PW2 – maternal uncle of the prosecutrix and real brother of the Appellant; PW3 – Poonam Kumbhar, panch to the spot panchanama (hostile), PW4 – the prosecutrix (complainant) ; PW5 – grandmother of the prosecutrix, PW6 – Bhimrao Yadav, panch to the spot panchanama (hostile) ; PW7- Sangita More, neighbour; PW8 – Rajendra Sanap, who carried the muddemal articles and handed over the same to FSL, Pune; PW9 – Dr.Sumayya Jamadar, the doctor who examined the prosecutrix; PW10 – maternal aunt of the prosecutrix and the sister of the Appellant; PW11 – Sharad Memane, API attached to the Kodoli Police Station (Investigating Officer) and PW12 – Raghunath Madane, the Headmaster, to prove the age of the prosecutrix, that she was 15 years at the relevant time.

The defence of the Appellant was that of total denial and false implication.

According to the Appellant, on the day of the incident, as the prosecutrix did not go with her friend for washing clothes and decided to

go alone, he became suspicious and decided to follow her; that he saw her with another boy in the field, who on seeing him ran away from the spot. He has stated that he slapped the prosecutrix for her behavior. According to the Appellant, he was not aware that the prosecutrix had made allegations of rape, as against him to his sister and mother and hence when his mother returned and started abusing him, he uttered the words “यात मी जगावेगळे काय केले?”. The Appellant has filed his written say (Exhibit – 53).

The learned Special Judge after considering the evidence on record, passed the Judgment and Order dated 28th April, 2016, convicting and sentencing the Appellant, as mentioned in paragraph 1 of this Judgment. The learned Special Judge while acquitting the Appellant of the offences under the Protection of Children from Sexual Offences Act, observed that the prosecution had failed to prove that the prosecutrix was below 18 years and as such in the absence of cogent and convincing documentary evidence to show that the prosecutrix was a minor, acquitted the Appellant of the said offences.

3. Ms.Deshmukh, learned counsel for the Appellant submitted

that the Appellant has been falsely implicated in the said case, by his mother and other siblings. She submitted that the evidence of the neighbor i.e. PW7- Sangita More, supports the Appellant's case that he was not accompanying the prosecutrix and was not carrying any instrument in his hand at the relevant time. She submitted that the prosecutrix could have well deposed the incident to her great grandmother and grandfather, who were at home at the relevant time, however, non-disclosure to them, raises suspicion affecting the credibility of the FIR. She relied on the Judgment of the Apex Court in the case of ***Sham Singh v/s The State of Haryana***¹, in support of her submission.

4. Learned APP submitted that no interference was warranted in the impugned Judgment and Order of conviction and sentence. He submitted that the evidence of the prosecutrix is corroborated by the evidence of her grandmother (PW5), her uncle (PW2) and her aunt (PW10). He submitted that there is nothing on record to show why the immediate relatives of the Appellant would falsely implicate him. He submitted that the FIR has also been lodged at the earliest, and delay

1 Criminal Appeal No.544 of 2018, decided on 21st August, 2018.

explained.

5. Heard learned counsel for the parties at length and perused the papers with the assistance of the learned counsel.

6. Admittedly, the Appellant is the maternal uncle of the prosecutrix (PW4). It is not in dispute that as the prosecutrix's mother had left the house, when the prosecutrix was about 4 to 5 years of age and hence, the prosecutrix and her brother were staying in village Mohare with their maternal grandmother (PW5), grandfather, maternal uncle (PW2), the Appellant and great grandmother. According to the prosecutrix, (PW4), her grandmother (PW5) had gone to Pandharpur on 3rd July, 2014, her brother had gone to their maternal aunt at Kolhapur on 5th July, 2014; and uncle (PW2) had also gone to Karad, prior to the incident. She has stated that on 7th July, 2014, at about 12.30 p.m., she, her grandfather, great grandmother and the Appellant were present in the house. She has stated that the Appellant told her that he was going to take fodder and that she could come with him, so that she could wash her clothes at the canal. She has stated that pursuant thereto, she carried the clothes and accompanied

the Appellant. She has stated that on the way, the Appellant stopped her, went to the sugarcane field and returned back; that the Appellant asked the prosecutrix to follow him; that the Appellant went to the sugarcane field, where she followed him; that the Appellant asked her to sit down, held her hands and asked her “करुया काय” (sexual intercourse); that she replied ‘no’ and started crying; that the Appellant threatened to kill her if she raised hue and cry; that the Appellant asked her to lay down, removed her clothes as well as his; that thereafter, the Appellant put his penis on her vagina and laid on her person; that she started crying; that after some time the Appellant stood up and asked the prosecutrix to wear her clothes; that he told her that he will not be bothered, even if she lodged a complaint; that thereafter, she went to the canal to wash the clothes and the Appellant left the spot. She has stated that after washing the clothes, she returned to the house. She has stated that after the said incident, the Appellant went to Pandarpur and hence she contacted her maternal aunt (PW10), who was staying at Kolhapur on telephone and told her that she wanted to tell her something and that she should take her to her house. PW4 - prosecutrix has further stated that her maternal uncle (PW2) came to village Mohare and took her to Kolhapur i.e. to her maternal aunt’s (PW10) house. She has

stated that she disclosed the incident to her maternal aunt (PW10) and the same was also disclosed to her grandmother (PW5) on 11th July, 2014 when she came to Kolhapur. PW4 - prosecutrix has further stated that she and her grandmother (PW5) came to Village Mohare, where PW5 - grandmother of the prosecutrix scolded and abused the Appellant, to which, the Appellant replied “यात मी जगावेगळे काय केले?”. PW5 - grandmother and the prosecutrix thereafter went to Sarpanch and thereafter to the Kodoli Police Station and lodged the complaint. The complaint/FIR by the prosecutrix is at Exhibit – 19. The prosecutrix’s statement was also recorded before the learned Judicial Magistrate, where she reiterated the aforesaid. The evidence of the prosecutrix is corroborated by the evidence of PW10 – maternal aunt, PW2 - maternal uncle of the prosecutrix and PW5 - grandmother of the prosecutrix, on all material aspects.

7. According to the PW10 (maternal aunt of the prosecutrix), she received a call from the prosecutrix, who disclosed to her that she wanted to come to Kolhapur as she wanted to disclose something to her, pursuant to which, she asked PW2 - maternal uncle of the prosecutrix to go to village Mohare, to bring the prosecutrix to Kolhapur. Thereafter PW2 took

the prosecutrix to Kolhapur, where the prosecutrix made the disclosure to PW10, about the incident which took place in the field on 7th July, 2014. The evidence of PW10 – maternal aunt of the prosecutrix shows that on learning about the said incident she informed PW5 - grandmother of the prosecutrix, who came to Kolhapur, where she disclosed what had happened, pursuant to which, PW5 and the prosecutrix went to village Mohare. The evidence of PW5 - grandmother of the prosecutrix shows that she questioned the Appellant about the incident and scolded and abused him and thereafter she and the prosecutrix went to the Kodoli Police Station, where the complaint was lodged. The evidence of all the witnesses i.e. PW2 - maternal uncle of the prosecutrix and brother of the Appellant, PW5 - grandmother of the prosecutrix and mother of the Appellant and PW10 - maternal aunt of the prosecutrix and sister of the Appellant, all corroborate each other evidence and there is nothing in their cross examination to discredit their testimonies. Infact, a perusal of the cross examination of the said witnesses shows that no suggestion has been made to any of these witnesses, for them to falsely depose against the Appellant.

8. As far as the evidence of PW7- Sangita More, neighbour, is concerned, she has stated that she had seen the Appellant and the prosecutrix in the month of July in the afternoon, while going towards field. She has stated that she had seen the prosecutrix carrying basket containing clothes on her head and the Appellant behind her. She has stated that when she asked the prosecutrix where she was going, she disclosed that she was going to wash the clothes whereas the appellant disclosed that he was going to get fodder.

9. Learned Counsel for the Appellant laid much emphasis on the cross examination of PW7- Sangita More, wherein PW7 had stated that the prosecutrix was ahead and the Appellant was behind her and that they were going independently and as such the said admission according to her shows that they were not talking to each other, thus supporting the defence case i.e. the Appellant was secretly following her. There is nothing in the evidence which shows that the prosecutrix and the Appellant were at such a distance that they were not aware of each other's existence. If the examination-in-chief is seen, PW7- Sangita More, in her examination-in-chief has stated that when she had seen the Appellant and the prosecutrix in

the month of July, in the afternoon, the prosecutrix was carrying a basket containing clothes whereas the Akshay (Appellant) had nothing with him and that when she questioned the prosecutrix, she stated that she was going to wash clothes and the Appellant disclosed that he was going to bring fodder. Thus, the submission of the learned counsel for the Appellant, that the admission in the cross examination supports the defence case is devoid of merit inasmuch as, the evidence of PW7 - Sangita More, will have to be read and appreciated in its entirety and not in isolation. The admission did not show that the Appellant was at such a distance that the prosecutrix was unaware that the Appellant was behind her.

10. As far as medical evidence is concerned, i.e. PW9 – Dr.Sumayya Mutalik Jamadar, the history given to her of sexual assault on 7th July, 2014, as narrated by the prosecutrix is consistent with her evidence. The history disclosed to PW9 – Dr.Sumayya Jamadar is of alleged sexual assault on 7th July, 2014, at around 1.00 p.m. in the farm when the prosecutrix had gone to wash clothes. In the present case, non finding of any injury to the hymen or any other part would not be relevant having regard to the fact, that it is not the case of the prosecutrix that there

was penetrative sexual assault on her. Infact the evidence of PW1 – Dr.Mangesh Shivaji Mane, who examined the Appellant has gone unchallenged. Exhibit -12 issued by Dr.Mane shows that the appellant had made a statement to him that he had not penetrated inside the vagina and that he had touched upto labia majora of victim and masturbated on ground. He has further stated that as the prosecutrix cried after removing her clothes, he did not force her further. The defence of the Appellant that he followed the prosecutrix as he was suspicious, since she was going alone and found her with another boy, who on seeing him ran away, pursuant to which he slapped the prosecutrix cannot be accepted as the said defence has come for the first time in his 313 statement. No foundation has been laid by the Appellant in the cross examination of any of the witnesses, in particular the prosecutrix. Non-disclosure of the incident by the prosecutrix to her grandfather and great grandmother will not in anyway affect the prosecutrix's testimony, inasmuch as, the prosecutrix has at the earliest informed the maternal aunty (PW10) on phone and told her that she wanted to disclose something to her and that she should be taken to Kolhapur. What cannot be lost sight of is, that the prosecutrix was a young girl, who was raped by her uncle, in this circumstance to disclose to the grandfather,

(father of the Appellant) and great grandmother would have been difficult. In cases like this, where the perpetrator is within the family, disclosure is made to persons in whom there is some comfort level and where the person to whom the disclosure is made, is capable of taking some action. In this case, the Appellant's mother, brother and sister, have all deposed against the Appellant, as he had breached the sanctity of the relationship between the prosecutrix and the appellant i.e. relationship of uncle and niece. No reason has been forthcoming for the witnesses to falsely implicate the Appellant. The Appellant by his act had taken advantage of the prosecutrix, who was related to him i.e. his niece, by taking her to a field, and sexually exploiting her.

11. Having regard to the evidence on record, no interference is warranted in the impugned Judgment and Order, convicting and sentencing the Appellant as aforesaid.

12. Accordingly, the Appeal is dismissed.

13. I would like to record a word of appreciation for the able assistance provided and the efforts taken by Ms.Yogita Deshmukh, and Mr.P.H.Gaikwad, A.P.P in conducting the Appeal. High Court Legal Services Committee to award fees of the learned Appointed Advocate, as per Rules.

REVATI MOHITE DERE, J.