

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.191 OF 2016

PRAKASH JAGANNATH SADAMATE)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Ashish Satpute, Appointed Advocate for the Appellant.

Mr.Amit Palkar, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 23rd SEPTEMBER 2019

ORAL JUDGMENT :

1 By this appeal, the appellant/accused is challenging the judgment and order dated 28th January 2016 passed by the learned Special Judge and Additional Sessions Judge, Sangli, in Special Case (POCSO) No.97 of 2013 for offences punishable under Section 376(2(f) of the Indian Penal Code as well as under Section 6 of the Protection of Children from Sexual Offences Act,

2012 (hereinafter referred to as POCSO Act for the sake of brevity) apart from the offence punishable under Section 506 of the Indian Penal Code. For offences punishable under Section 376(2)(f) of the Indian Penal Code as well as under Section 6 of the POCSO Act, the appellant/accused is separately sentenced to suffer rigorous imprisonment for 11 years apart from direction to pay fine of Rs.2500/- and in default, to undergo simple imprisonment for 1 month. For the offence punishable under Section 506 of the Indian Penal Code, he is sentenced to suffer rigorous imprisonment for 6 months. Substantive sentences are directed to run concurrently by the learned trial court.

2 Facts, in brief, leading to the prosecution and the resultant conviction of the appellant/accused, can be summarised thus :

- (a) First Informant/PW3 Dipali is mother of the victim female child/PW4, who on the date of the incident, was below 10 years of age. The victim female child/PW4 was residing along with her mother PW3 Dipali and other relatives at

Vitthalwadi of Palus Taluka in Sangli District. She was taking education in Fourth Standard at the Zilla Parishad School of Vitthalwadi.

- (b) PW3 Dipali noticed that her daughter i.e. the victim female child/PW4 remained silent and became introvert. Therefore, on 6th February 2013, PW3 Dipali took her daughter i.e. the victim female child/PW4 in confidence and asked her the reason for her abnormal behaviour. Thereafter, the victim female child/PW4 disclosed to her mother - PW3 Dipali the fact that in the afternoon of 31st January 2013, when she was playing with her friend Nikita in the open place in front of office of Gram Panchayat, the appellant/accused caller her as well as her friend Nikita at the temple, by alluring them that he would give sweets to them. Then, the appellant/accused committed penetrative sexual assault on her by asking her to remove her knicker. Then, he gave threat to her not to disclose the incident to anybody else.

- (c) After hearing the trauma suffered by her daughter, PW3 Dipali disclosed the incident to her relatives. Her husband and other male members of the family then went to the house of the appellant/accused for questioning him. However, inmates of his house did not allow them to meet the appellant/accused. Then, they all met Sarpanch of Village Sambhaji Sadamate. The Sarpanch told them that a meeting would be convened on the next day and then suitable action would be taken.
- (d) On 7th February 2013, father of the victim female child/PW4 and other villagers including the Sarpanch went to the Zilla Parishad School of the village and disclosed the incident to teachers. The appellant/accused was found absconding. The Sarpanch then insisted the father of the victim female child/PW4 to wait for two days. Despite waiting for two days, the appellant/accused did not return, and therefore, on 9th February 2013, PW3 Dipali went to Police Station Palus and lodged the report which has resulted in registration of Crime No.12 of 2013 against the appellant/accused.

- (e) The victim female child/PW4 was then sent to Rural Hospital, Palus, where she was examined by PW5 Shivaji Gosavi, Medical Officer. The spot of the incident came to be inspected and Spot Panchnama Exhibit 18 was drawn. PW3 Dipali had produced frock and knicker of the victim female child/PW4 and the same was seized in presence of PW6 Balasaheb Ghadge - panch witness by Police Inspector Bhausahab Gondkar - Investigating Officer, by preparing Panchnama Exhibit 38. Document regarding age of the victim female child/PW4 came to be collected. The appellant/accused was arrested. He was also sent for medical examination and sample of his blood and semen came to be collected. The seized articles were sent for chemical analysis to Forensic Science Laboratory at Pune. On completion of investigation, the appellant/accused came to be charge-sheeted.
- (f) Charge for offences punishable under Sections 376(2)(f) and 506 of the Indian Penal Code as well as under Section 6 of

the POCSO Act was framed and explained to the appellant/accused. He pleaded not guilty and claimed trial.

(g) In order to bring home the guilt to the appellant/accused, the prosecution has examined in all eight witnesses. Material amongst them are PW3 Dipali – mother of the victim female child/PW4, PW5 Dr.Shivaji Gosavi, PW6 Balasaheb Ghadge – panch witness to the Seizure Panchnama Exhibit 38 and PW8 Bhausahab Gondkar – Investigating Officer. Defence of the appellant/accused was that of total denial and false implication. According to the defence, the appellant/accused was working as a Turner in a private company at Palus. He is absolutely unaware about the incident. The appellant/accused was not knowing the First Informant as well as the victim female child/PW4.

(h) After hearing the parties, the learned trial court, by the impugned judgment and order, was pleased to convict the appellant/accused and sentenced him accordingly, 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. He argued that Nikita, who happens to be friend of the victim female child/PW4, was very much present at the time of the incident. She is not examined by the prosecution and as such, case of the prosecution is unbelievable and unacceptable. To buttress this contention, he has placed reliance on the judgment in the matter of Navin Dhaniram Baraiye vs. The State of Maharashtra¹. The learned advocate further argued that complaint to the Sarpanch was that of eve teasing and not of rape. The First Information Report (FIR) came to be lodged after due deliberation with Hari Kadam, Police Sub-Inspector, who happens to be relative of the prosecuting party. The same is a counterblast to the apprehended case of atrocity likely to be filed by relative of the appellant/accused. The learned advocate further argued that cross-examination of the victim female child/PW4 shows that several boys by name Pakya were residing in the village and identity of the appellant/accused is not established. It is further argued that medical evidence is not

1 2018 Cri.L.J. 3393

supporting the case of the prosecution, and as such, the appellant/accused is entitled for acquittal.

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

5 I have considered the submissions so advanced and also perused the record and proceedings including oral as well as documentary evidence.

6 Law relating to appreciation of evidence of a victim in a rape case has been crystallized by catena of judgments by the Hon'ble Apex Court. At this juncture, it is apposite to quote observations from the judgment in the case of **State of Punjab vs. Gurmeet Singh**² wherein the Honourable Apex Court took a view that the Courts dealing with the rape cases shoulder a greater responsibility and they must deal with such cases with utmost sincerity. Relevant paragraph of the said judgment is reproduced as under :

2 1996 Cri.L.J. 172

“....It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit

reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.”

It is, thus, clear that, the court is required to consider broader probabilities of case of the prosecution rather than adhering to the technicalities of law. Minor contradictions and inconsistencies in case of the prosecution cannot be given any overbearing importance.

7 In the case in hand, the victim female child/PW4 was below 10 years of age, at the time of the alleged incident. Her age is not disputed by the defence. The prosecution has placed on record Certificate of Age of the victim female child/PW4 issued by P.V.P.G.H. Hospital, Sangli. The same is stating age of the victim female child/PW4 as 10 years. The prosecution has also placed on record Bonafide Certificate of the victim female child/PW4 issued

by Zilla Parishad School of Vitthalnagar, Sangli. The said Bonafide Certificate shows date of birth of the victim female child/PW4 as 11th April 2003. Both these documents are admitted by the defence and marked as Exhibits 33 and 30 respectively. Both these documents regarding age of the victim female child/PW4 are fully corroborating version of PW3 Dipali – mother of the victim female child/PW4, regarding date of birth of the victim female child/PW4 as 11th April 2003. The incident in question allegedly took place on 31st January 2013, and as such, on that day, the victim female child/PW4 was below 10 years of age. Thus, she was a child as defined by Section 2(d) of the POCSO Act.

8 Now let us examine whether evidence of the victim female child/PW4 demonstrates commission of penetrative sexual offence by the appellant/accused and whether she is a witness of truth. In the matter of Navin Dhaniram Baraiye (supra) relied by the learned advocate for the appellant/accused, co-ordinate Bench of this court has considered the issue of evaluation of evidence of a child witness. Reliance was placed on judgment of Radhey

Shyam vs. State of Rajasthan³ and paragraph 12 of the said judgment was reproduced. It reads thus :

“12 In Panchhi, (1998 SCC (Cri) 1561) after reiterating the same principles, this Court observed that the evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and, thus, a child witness is an easy prey to tutoring. This Court further observed that the courts have held that the evidence of a child witness must find adequate corroboration before it is relied upon. But, it is more a rule of practical wisdom than of law. It is not necessary to refer to other judgments cited by learned counsel because they reiterate the same principles. The conclusion which can be deduced from the relevant pronouncements of this Court is that the evidence of a child witness must be subjected to close scrutiny to rule out the possibility of tutoring. It can be relied upon if the court finds that the child witness has sufficient intelligence and understanding of the obligation of an oath. As a matter of caution, the court must find adequate corroboration to the child witness's evidence. If

3 (2014) 5 SCC 389

found, reliable and truthful and corroborated by other evidence on record, it can be accepted without hesitation. We will scrutinize PW-2 Banwari's evidence in light of the above principles."

9 It is, thus, clear that, evidence of a child witness is required to be evaluated carefully as children are prone to tutoring. However, in the case in hand, not a single question was put to the victim female child/PW4 in defence in order to demonstrate that she is a tutored witness. Be that as it may, it is in evidence of the victim female child/PW4 that on the day of the incident, after returning from the school at 2.30 p.m., she along with her friend Nikita were playing in front of office of Gram Panchayat of Vitthalwadi. The appellant/accused then called both of them by alluring them with the offer of providing sweets to them. She deposed that at the instance of the appellant/accused, they both went towards him. He had taken them to a temple and asked the victim female child/PW4 to remove her knicker. Accordingly, she removed her knicker. The appellant/accused made the victim female child/PW4 to sit on katta of the temple

and licked her private part. Thereafter, he attempted to insert his penis in her vagina. She started suffering pain and therefore shouted loudly. The appellant/accused then left her and while leaving her, gave threat to kill her, if the incident was disclosed to anybody else. The victim female child/PW4 further deposed that because of fret, due to threats given by the appellant/accused, she did not disclose the incident to anybody and therefore was frightened. She has then spoken about narration made by her to her mother – PW3 Dipali, after passage of time. While in witness box, the victim female child/PW4 identified her frock as well as her knicker. She also identified the appellant/accused before the court.

10 It is faintly argued that the offence was not that of penetrative sexual assault but at the most it can be an attempt to commit penetrative sexual assault. Section 3 of the POCSO Act makes it clear that even slightest penetration amounts to the offence of penetrative sexual assault. The victim female child/PW4 has categorically stated that the appellant/accused

attempted to insert his penis in her vagina causing pain to her. This implies that the appellant/accused tried to insert his penis in the vagina of the victim female child/PW4, who at the relevant time was below 10 years of age. This evidence certainly leads to the conclusion that there was penetration, may not be a full penetration, leading to the tearing of the hymen.

11 In cross-examination of the victim female child/PW4, an attempt was made to dispute identity of the appellant/accused as the perpetrator of the crime in question. It was sought to be suggested to her that several boys by name Pakya are residing in Village Vitthalwadi and therefore, she is unable to identify the appellant/accused. However, at the same time, questions were put to the victim female child/PW4 to show that she was knowing the appellant/accused very well, even prior to the incident. In paragraph 2 of the cross-examination of the victim female child/PW4, it is elicited from her mouth that she was knowing the appellant/accused prior to the incident, as he happened to be residing in the same village where she was residing and as the

appellant/accused was residing near the house of the victim female child/PW4. The victim female child/PW4 has answered these questions in affirmative but has stated that she did not know full name of the appellant/accused as well as name of his father. With this material elicited from cross-examination of the victim female child/PW4 vis-a-vis her evidence in chief-examination that the appellant/accused sitting in the dock is the very same person, who had committed rape on her, question of mistaken identity does not arise.

12 From cross-examination of the victim female child/PW4, it is further brought on record that she along with her friend Nikita were allured by offering sweets to them and as the appellant/accused tempted her as well as her friend, they followed him to the secluded temple in the village. This material brought on record from cross-examination of the victim female child/PW4 is cementing evidence of the victim female child/PW4.

13 It was attempted to demonstrate from cross-examination of the victim female child/PW4 that after the alleged

incident dated 31st January 2013, the victim female child/PW4 was following her normal pursuits till disclosure of the incident to her mother – PW3 Dipali. However, on this aspect, evidence of her mother – PW3 Dipali makes the position clear. PW3 Dipali has candidly stated before the court that her daughter i.e. the victim female child/PW4 was behaving abnormally and she became introvert, requiring her to ascertain as to what happened with her.

14 At the time of lodging the FIR by PW3 Dipali, knicker of the victim female child/PW4 was not handed over to the police. The FIR was lodged on 9th February 2013. Knicker of the victim female child/PW4 came to be seized by the police on 10th February 2013 under Panchnama Exhibit 38. It was attempted to demonstrate that the victim female child/PW4 used to hand over her clothes to her mother – PW3 Dipali regularly for washing. However, so far as the knicker was concerned, the victim female child/PW4 made it clear in her evidence that after the incident in question, as her knicker became white, she had kept it concealed in her bed and after six days, she had given it to the police. It is

further seen from her evidence that the said knicker was produced before the police only when police made inquiry in respect of the knicker. The victim female child/PW4 was below 10 years of age. Her mother – PW3 Dipali is a rustic female residing in Village Vitthalwadi and was doing housework. In such situation, it is not expected of them to know intricacies of law in production of knicker of the victim female child/PW4 to support their case. It was after inquiry of police that the knicker came to be produced by the mother of the victim female child/PW4 and as such, this aspect cannot be construed to doubt case of the prosecution.

15 PW3 Dipali has corroborated version of the victim female child/PW4 by stating that since prior to eight days of lodging the FIR, she was observing abnormal behaviour of her daughter i.e. the victim female child/PW4 and therefore, she enquired from her, about her such behaviour, on 6th February 2013. Thereafter, her daughter i.e. the victim female child/PW4 had disclosed about the penetrative sexual assault by the appellant/accused on her. Evidence of PW3 Dipali shows the steps

taken by her as well as her family members for taking recourse to law. Initially, house of the appellant/accused was visited by them for questioning the appellant/accused. His family members prevented them. Evidence of PW3 Dipali further shows that then Sarpanch of the village was approached and he kept them waiting for two days with an assurance that the appellant/accused would be found out and would be questioned in the matter. Ultimately, as the appellant/accused was not found in the village, FIR came to be lodged by PW3 Dipali on 9th February 2013. No doubt, this FIR was lodged after having a talk with Hari Kadam, Police Sub-Inspector, who happens to be relative of the prosecuting party, but that by itself, would not amount to a circumstance which may create doubt in case of the prosecution. In such eventuality, it is but natural, for a layman, to get information about further course of action to be taken in the matter. This is reflected from conduct of the members of the prosecuting party in approaching the Sarpanch of the village as well as teachers from the school, where the victim female child/PW4 was taking education. In the similar manner, relative - who happens to be a Police Sub-Inspector, was

also contacted by members of the prosecuting party. This seems to be a natural conduct.

16 Some minor inconsistencies and minor contradictions were sought to be pressed in service. Whether the victim female child/PW4 had shouted or not at the time of the alleged incident and whether non-disclosure of such shouting to the Investigator casts a shadow of doubt on the prosecution case, is a matter to be considered by the court. The victim female child/PW4 was below 10 years of age at the time of the incident and it is but natural for her to shout when pitted against a young boy. Non-disclosure of shouting by her to police does not amount to omission, which goes to the root of the prosecution case.

17 PW5 Dr.Shivaji Gosavi had examined the victim female child/PW4 on 9th February 2013. He could not find any injury marks on the person of the victim female child/PW4. This, according to the learned advocate for the appellant/accused, negates the case of prosecution. However, the law is otherwise. 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](#)⁴, 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.

18 The Honourable Apex Court in [B.C.Deva v. State of Karnataka](#)⁵, inspite of the fact that no injuries were found on person of the prosecutrix, yet finding her version to be reliable and trustworthy, the Honourable 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

4 (1998) 8 SCC 635

5 (2007) 12 SCC 122

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.”

Thus, non-finding of injury on the person of the victim or on the private part of the victim, after a lapse of eight or nine days cannot be a circumstance to throw out the testimony of the victim female child/PW4.

19 Evidence of PW6 Balasaheb Ghadge – panch witness so also that of PW3 Dipali makes it clear that on 10th February 2013, PW3 Dipali had produced knicker of her female child i.e. the victim female child/PW4, before the police. PW6 Balasaheb Ghadge deposed that the frock as well as the knicker produced by PW3 Dipali came to be seized by police by preparing Seizure Panchnama Exhibit 38. This fact is also vouched by PW8

Bhausahab Gondkar, Investigating Officer. Contemporaneous panchnama at Exhibit 38 also shows that blue frock and a knicker came to be seized by the police on 10th February 2013. The Seizure Panchnama Exhibit 38 further shows that the said knicker was having white stain. Evidence of PW8 Bhausahab Gondkar, Investigating Officer, shows that after his arrest, the appellant/accused was medically examined and sample of his blood as well as semen came to be collected. His evidence further shows that seized samples were sent for chemical analysis at the Regional Forensic Laboratory at Pune. The Chemical Analyser's Report at Exhibits 15 and 12 shows that blood of the appellant/accused was that of "A" Group and semen of "A" Group was found on seized knicker of the victim female child/PW4. It is argued that, according to the prosecution case, the victim female child/PW4 was asked to remove her knicker, and as such, there cannot be any possibility of the said knicker staining with semen. It is further argued that evidence of the victim female child/PW4 does not show that there was discharge of semen. The victim female child/PW4 was below 10 years of age at the time of

incident and as such, it is not expected of her to know nature of sexual act, and more particularly, the act of emission of semen. Similarly, her evidence shows that after the act, she put on her knicker and returned back to her house. In that process, there is every likelihood of staining of the knicker by semen. No plausible explanation can be found in this regard in statement of the appellant/accused recorded under Section 313 of the Code of Criminal Procedure. With this, foundational facts are proved by the prosecution.

20 With this evidence, the prosecution has certainly proved that the appellant/accused had committed penetrative sexual assault on the victim female child/PW4 and as she was below 12 years of age at the time of commission of the offence, the penetrative sexual assault takes shape of aggravated penetrative sexual assault. Evidence of the victim female child/PW4 shows that she was threatened by the appellant/accused to not to disclose the incident with a consequence to kill her. So far as non-examination of Nikita is concerned, position of

law is settled that where available evidence makes out the offence, non-examination of other witnesses, who may be available, cannot create doubt in prosecution case. However, when available evidence is discrepant and insufficient to prove the offence, then availability of other evidence and non-production of the same before the court, assumes importance. Such is not the case in hand. Available evidence is certainly sufficient to establish the guilt of the appellant/accused.

21 With this, I conclude that the prosecution has established the offence with which the appellant/accused was charged. Now let us examine sentencing part of the impugned judgment and order. The appellant/accused though rightly convicted of offences punishable under Sections 376(2)(f) of the Indian Penal Code as well as under Section 6 of the POCSO Act, he is sentenced separately for both these offences, as indicated in the opening paragraph of this judgment. Section 42 of the POCSO Act deals with alternate punishment. It provides that where an act or omission constitutes an offence punishable under the said Act

and also under Section 376 of the Indian Penal Code, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under the said Act or under the Indian Penal Code as provided for punishment which is greater in degree. In this view of the matter, the appellant/accused ought not to have been punished twice by the learned Special Judge. The appeal, therefore, needs to be partly allowed. Hence, the order :

ORDER

- i) The appeal is partly allowed.
- ii) Conviction of the appellant/accused for offences punishable under Sections 376(2)(f) and 506 of the Indian Penal Code as well as under Section 6 of the POCSO Act is maintained. However, in view of inflicting of punishment to the appellant/accused for the offence punishable under Section 6 of the POCSO Act, sentence of 11 years of rigorous

imprisonment, fine of Rs.2500/- and default sentence of simple imprisonment for 1 month imposed on the appellant/accused for the offence punishable under Section 376(2)(f) of the Indian Penal Code is quashed and set aside.

- iii) Needless to mention that the sentence imposed on the appellant/accused for the offence punishable under Section 6 of the POCSO Act as well as under Section 506 of the Indian Penal Code is maintained.
- iv) Rest of the part of the impugned judgment and order of the learned trial court is maintained.
- v) The appeal is accordingly disposed off.
- vi) Copy of this judgment and order be sent to the appellant/accused in the jail.

(A. M. BADAR, J.)