

Anand

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

CRIMINAL APPEAL NO. 266 OF 2016

Annappa Ramchandra Hadpad .Appellant
Age : 52 yrs, Occu : Barber
Residing at Udagai, Tal. Akkalkot
District – Solapur.

Vs.

The State of Maharashtra .Respondent
(At the instance of Akkalkot South
Police Station C. R. No. 07 / 14
District – Solapur)

Mr. R. B. Vijaymane a/w Ms Supriya Kak, Advocate, for the
Appellant
Mr. S. V. Gavand, APP, for the Respondent – State

CORAM : REVATI MOHITE DERE, J.

DATE : 19.03.2019

ORAL JUDGMENT

. This Appeal is directed against the Judgment and
Order dated 30.01.2015 passed by the learned Special Judge,
Solapur in Sessions Case No. 77 of 2014, convicting and
sentencing the Appellant as under :-

- for the offence punishable under Section 6 of the
Protection of Children from Sexual Offences Act, 2012 (for short

'POCSO'), to suffer R. I. for ten years and to pay fine of Rs. 10,000/-, in default to undergo further R. I. for six months;

- for the offence punishable under Section 506 of the Indian Penal Code, to suffer R. I. for two years and to pay fine of Rs. 1,000/-, in default to undergo further R. I. for three months.

The said substantive sentences were directed to run concurrently.

From the fine amount so realized, compensation of Rs. 10,000/- was directed to be paid to the prosecutrix vide Section 357(1)(b) of the Code of Criminal Procedure.

2. The matter was shown as 'part heard' today and it was informed to Mr. Vijaymane, Advocate that in case, he failed to remain present, an Advocate would be appointed to espouse the cause of the Appellant, who is in jail. When the aforesaid Appeal was called out, as Mr. Vijaymane, Advocate was not present, Ms. Kak, Advocate was appointed as Amicus Curiae. During the course of the hearing, Mr. Vijaymane, Advocate appeared and hence,

both, Mr. Vijaymane as well as Ms Kak, Advocates were heard in the said Appeal.

3. The prosecution case in brief is as under :-

According to the Complainant (PW.1) i. e. father of the prosecutrix, the Appellant is his step brother and also was his neighbour. He has stated that his daughter was aged 11 years, at the relevant time. According to PW.1, as his daughter (PW.3) was complaining of abdominal pain for about two months prior to the lodging of the complaint / FIR, he had taken her to Dr. Nandikole of the Village; and that as his daughter (PW.3) did not recover, he admitted her to the Civil Hospital, Solapur for treatment. He has stated that his daughter (PW.3) told him that the Appellant had sexually assaulted her repeatedly; and that she had also disclosed the said fact to the Medical officer of the Civil Hospital, Solapur. According to PW.1, as the Appellant had threatened his daughter not to disclose the same to any person, she had not disclosed the said fact, till she was admitted to the Civil Hospital. He has stated that pursuant to the said information, he lodged a

complaint / FIR as against the Appellant on 10.01.2014 (Exh. 9).

During the course of investigation, the Appellant was arrested and statements were recorded. After investigation, charge-sheet was filed as against the Appellant in the Court of the learned JMFC. As the offence was sessions triable, the same was committed to the Court of learned Sessions Judge, for trial. The learned Sessions Judge framed charge as against the Appellant for the offences punishable under Section 376 (2)(f)(i) of the Indian Penal Code, Section 5(m)(n) r/w 6 of the POCSO Act and Section 506 of the Indian Penal Code. The Appellant pleaded not guilty to the charge and claimed to be tried. The defence of the Appellant was that of total denial and false implication. According to the Appellant, he was falsely implicated, as he had an agricultural land, whereas PW.1 – (prosecutrix's father) did not have any land and as such, to grab the property, a false case was filed.

4. The prosecution in support of its case examined six witnesses i. e. PW.1, the Complainant (father of the prosecutrix); PW.2 – Rajshekhar Kore, neighbour; PW.3 – the prosecutrix (aged 13 years); PW.4 – mother of the prosecutrix; PW.5 – Dr.

Jadhav, who examined the prosecutrix and PW.6 – Revannath Kondiba Damale, PSI, who was attached to the Akkalkot South Police Station and who conducted the investigation and filed charge-sheet.

5. The evidence of PW.1 – the Complainant and father of the prosecutrix shows that the Appellant was his step brother and was residing next door. He has stated that his daughter (PW.3 – prosecutrix) was aged 11 years, when the incident took place. He has stated that as his daughter (PW.3) had complained of abdominal pain for about two months, he had taken her to Dr. Nandikole of their Village. He has further stated that as she did not recover and as her stomach was swollen, they took PW.3 to the Civil Hospital, Solapur for treatment. He has stated that in the hospital, his daughter (PW.3) disclosed to them that the Appellant had sexually assaulted her repeatedly. He has stated that his daughter had made the said disclosure even to the Medical officer, Civil Hospital, Solapur. According to PW.1, the Appellant had sexually assaulted his daughter (PW.3) under a threat to her life and had also threatened her not to disclose the

same to any person. He has stated that pursuant to the information received by him, he lodged a complaint / FIR on 10.01.2014 (Exh. 9) with the Akkalkot Police Station.

6. The tenor of the cross-examination of the said witness is to show the strained relations between the Appellant and the Complainant (PW.1), who were step-brothers. In his cross-examination, PW. 1 has admitted that at the relevant time, he did not have any agricultural land, whereas the Appellant had agricultural land. He has also admitted that there was a common wall between their houses. The said witness has, however, denied the suggestion that his wife (PW.4) used to regularly pick up quarrels with the Appellant and that they were not on talking terms for about four years with the Appellant. It was also sought to be suggested that the quarrel was on account of demand of agricultural land from the Appellant, which was denied by the said witness. PW.1 has denied the suggestion that, he did not take his daughter to Dr. Nandikole of their village and that he was deposing falsely that the Appellant had repeatedly sexually assaulted his daughter (PW.3), under threats.

7. The mother of the prosecutrix was examined as PW.4. She has in her evidence stated that the Appellant was the older step brother of her husband (PW.1) and that he was staying in the adjacent house. She has also stated that she was a tailor and was working from home. She has further stated that at the time of occurrence, her daughter (PW.3 – prosecutrix) was studying in the 5th Std. According to PW.4, just before Diwali festival, as her daughter was suffering from abdominal pain, they took her to Dr. Nandikole of their village. She has stated that Dr. Nandikole gave medical treatment to their daughter, however, as she did not recover, they took her, later, to the Civil Hospital, Solapur for further treatment. She has stated that the Doctor of the Civil Hospital disclosed to them that there might be sexual assault on their daughter and on enquiry with their daughter, she disclosed that the Appellant had sexually assaulted her in the absence of the family members at home and had threatened her not to disclose the same to anybody. She has stated that their daughter (PW.3) was medically treated and that her husband had lodged a complaint / FIR with the police.

8. The tenor of the cross examination of the said witness is to show that false accusation was made by the said witness against the Appellant and that no such disclosure was made by their daughter.

9. The prosecutrix (PW.3) in her evidence has stated that she knew the Appellant, as he was her uncle and that she referred to him as 'Baba'. She has stated that her father was working as a barber and mother as a tailor. She has further stated that the Appellant used to take her home forcibly and strip off her clothes and lay down on her person and had threatened her not to disclose the same to anybody or else he would kill her. She has further stated in para 3 of her evidence as under :-

“Whenever the accused used to lay down on my person, he would insert his penis into my vagina. The accused started such act after two months from the demise of my grandmother. I suffered from abdominal pain and inflammation in my private part. My parents took me to Dr. Nandikole of my village. I did not recover from his treatment. Later on, my parents brought me to Civil Hospital, Solapur. I

told the entire episode and act of accused when I was brought to the Civil Hospital, Solapur. Even today, I suffer from abdominal pain.”

She has stated that the Medical officer examined her and thereafter, the police recorded her statement.

10. As far as cross-examination of this witness is concerned, she has admitted that she had not disclosed the incident of sexual assault either to Dr. Nandikole of their village nor to the Medical officer of the Civil Hospital, Solapur. She has stated that she made the disclosure about the sexual assault only to her mother. The said witness has denied the suggestion that she was instructed by her mother and grandmother to make allegations against the Appellant. She has also denied that she has falsely implicated the Appellant and given false evidence at the behest of her mother and grandmother.

11. The evidence of PW.5 – Dr. Jadhav shows that he was attached to the Civil Hospital, Solapur at the relevant time. He has stated that the prosecutrix was brought by her grandmother

on 09.01.2014 around 12.00 noon, as she had pain in the abdomen. He has stated that he referred the prosecutrix to the Surgery Department and that the prosecutrix gave history to the Medical officers of the Surgery Department that she was sexually assaulted by her uncle i. e. the present Appellant for the last two years on every weekend i. e. on Saturday and Sunday. It is noted that there was no history of use of condoms and no history of drugs intoxication during sexual assault. The last sexual assault was stated to be a month back. PW.5 – Dr. Jadhav in his evidence has specifically stated that when he clinically examined the prosecutrix, he found no hymen injury on her. Accordingly, he issued the Medical Certificate. He has also stated that he found no injuries to the genital / anus. He also found no evidence of non penetrative assault nor any evidence of injuries and minimal application of force or restrain.

12. In his cross-examination, PW.5 has admitted that it was the prosecutrix's grandmother who gave the history of sexual assault by the Appellant for the last two years, every weekend on Saturday and Sunday and that it was her grandmother, who

disclosed the age of the prosecutrix as 10 years.

13. Heard the learned counsel for the parties and perused the evidence with their assistance. A perusal of the evidence of PW.1 i. e. father of the prosecutrix nor PW.4 - mother of the prosecutrix, shows that neither of them have disclosed that the prosecutrix's grandmother had accompanied them to the Hospital. According to the prosecution, the incident of sexual assault came to light only when the prosecutrix was taken to the Civil Hospital, Solapur for treatment, where she made the disclosure to the Medical officer. Although, both, PW.1 and PW.4 have stated that the prosecutrix gave history of sexual assault to the Doctor, the evidence of PW.3 shows that she did not disclose anything to the Medical officer in the Civil Hospital, Solapur and had disclosed the incident to her mother. In fact, PW.3 has also not stated that she had disclosed the incident of sexual assault to her grandmother. The prosecution has not examined the grandmother.

14. PW.5 – Dr. Jadhav although in his examination-in-

chief has stated that the prosecutrix gave history to the Medical officer of the Surgery Section in his cross examination has stated that the information was disclosed by the grandmother. The Medical Report shows that the prosecutrix was brought by her grandmother with history of pain in the abdomen. It appears from the said medical case papers that the history was narrated by the prosecutrix's grandmother, that the prosecutrix was sexually assaulted for the last two years by her uncle (Appellant) on every weekend i. e. on Saturday and Sunday. The clinical examination of PW.2 showed that no abnormality was detected to the Labia Majora, Labia Minora, Clitoris or Vagina. It is the prosecution case, that the prosecutrix was first taken to Dr. Nandikole in the village, as she had pain in the abdomen; however, as the pain continued, she was taken to the Civil Hospital, Solapur. It is pertinent to note that although there is a specific allegation of sexual assault as noted above in para 3 of the prosecutrix's evidence, the medical evidence of PW.5 – Dr. Jadhav is to the contrary. PW.5 – Dr. Jadhav's evidence shows that after clinical examination of the prosecutrix, he found no hymen injury; that there were no injuries to the genital / anus;

nor was there any evidence of non penetrative assault or no evidence suggestive of application of force / restrain. The C. A. Reports also do not in any way support the prosecution case of sexual assault. The prosecution has not brought on record any diagnosis / finding with regard to the final cause for the prosecutrix's abdominal pain. The prosecutrix's statement under Section 164 of Cr. P. C. has also not been recorded. In fact, PW.6, the investigating officer has in his cross-examination clearly admitted that though it transpired during investigation, that the prosecutrix was treated by Dr. Nandikole of the village, he did not record his statement. He has also admitted that even after charge-sheet was filed, he did not make enquiry about Dr. Nandikole. The evidence on record raises several questions, with regard to the alleged incidents of sexual assault. The same is also to be evaluated keeping in mind the defence of the Appellant. The evidence is not free of infirmities, and also not sufficient to show the complicity of the Appellant. It also appears that PW.4 was a tailor and was working from home and there is nothing on record to show why and for what, the prosecutrix was visiting the Appellant, on weekends (holidays). Having regard

to the evidence on record, in particular, the medical evidence, the evidence of witnesses with respect to sexual assault does not inspire confidence. Accordingly, the conviction of the Appellant for the offences for which he was convicted cannot be sustained.

15. Accordingly, the Appeal is allowed. The Judgment and Order dated 30.01.2015 passed by the learned Special Judge, Solapur in Sessions Case No. 77 of 2014, convicting and sentencing the Appellant is quashed & set aside. The Appellant is acquitted of the offences for which he was convicted. His bail bonds stand cancelled.

(REVATI MOHITE DERE, J.)