

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 347 OF 2015**

Tillam Nalbahaddur Singh
Age - 61 years, R/o Kalina Education
Society School Sunder Nagar,
Santacruz (East), Mumbai.
A/P : Kolhapur Central Prison
Convict No.- C- 5816, Cricle – 3/2,
Dist. : Kolhapur, Kalamba,
Maharashtra – 416 007.

... Appellant

V/s.

The State of Maharashtra
at the instance of Vakola Police Station
Vide C.R.No.57 of 2011.

... Respondent

Ms. Megha Bajoria, Appointed for Appellant.

Mr. S.R. Agarkar – APP for the State.

CORAM : SMT. SADHANA S. JADHAV, J

DATED : 9TH SEPTEMBER 2019.

ORAL JUDGMENT :

1 Heard. The appellant herein is convicted by the Additional Sessions Judge, Greater Bombay vide judgment and order dated 25th February 2013 in Sessions Case No.452 of 2011 for the offences punishable under section 377 of the Indian Penal Code and sentenced to suffer R.I. for seven years and fine of Rs.25,000/- and in default to

suffer six months S.I., Rs.20,000/- out of fine, if deposited, be given to the prosecutrix towards compensation. The prosecution has examined 10 witnesses to bring home the guilt of the accused. Implicit reliance can be placed upon evidence of PW1, PW3, PW7 and PW9.

2 Such of the facts necessary for the decision of this appeal are as follows :-

It is the case of prosecution that the daughter of PW1 was studying in Kalina Education Society School at Kalina. On 3rd February 2011, the daughter of PW1 - (complainant – Mrs. Nirmala Tyagi) informed her, at about 12.30 pm that she had been sexually abused by Budha uncle in the school. That the original accused No.2 -Mr. Miranda slapped her, original Accused No.3 – Shaila Suresh Mohite had pinched her. The victim had appeared to be scared and frightened and therefore, PW1 Mrs. Tyagi had taken her to Dr. Shivani who had referred her to Sion Hospital. The victim was examined on 6th February 2011 by PW3 – Dr. Pradnya Supe. That the FIR was lodged on 6th February 2011.

3 PW1 has deposed in consonance with the FIR. PW1 in her cross-examination has admitted that on 28th January 2011 there was Annual Day function in the school. She had a pass. Therefore, she was allowed to enter the hall. Her brother Santosh Jaiswal was not possessing a pass and therefore, the present appellant had objected to his entrance in the school. Being aggrieved by the said gesture, Santosh Jaiswal pelted stone, created ruckus in the school so much so that the Principal had to summon the Police for maintaining law and order. That, Santosh Jaiswal had threatened the appellant at that stage that he would have to suffer consequences for objecting his entrance in the school for the said function.

4 PW3 – Dr. Pradnya Supe has deposed before the Court that history was not given by the victim but it was given by her mother alleging sexual assault upon her minor daughter on 3rd February 2011. On clinical examination she had arrived at the conclusion that the victim had undergone recent sexual intercourse.

5 In the cross-examination, PW3 has specifically stated that when the patient was examined in the out-patient department, it was

recorded that hymen was intact. According to PW3, the victim could not give proper history. There was no external injury on her body, no injury on the posterior part of the vagina, there was no swelling, there was no abrasion or injury either on the labia minora or labia majora. There was no bleeding and laceration of the vagina. She has further admitted in the cross-examination that in the eventuality a four year old girl is subjected to sexual intercourse all the above mentioned injuries would be apparent. Doctor has refused to comment on the proposition any further. She has also admitted that there could be several reasons for hymenal tear besides sexual intercourse. The report of the clinical examination is also a part of the record which indicates that there was whitish discharge from vagina. There was no history of bleeding from the vagina. No history of any external injuries. Upon inspection it was seen that there is a spherical defect with regular margins.

6 PW7 is the victim. She has admitted that the present appellant is not the watchman for primary section. According to her, initially she had not seen Budha uncle. That there was bleeding. She has admitted that the history was narrated by her mother. She was

shown a chart of insects and questioned by the Court as to whether this is 'kida' and she had answered in the affirmative. The said chart is taken on record and marked as Article 'B'. It was specific allegation of the victim that it was accused no.2 who had taken her to the activity room, locked her inside. Thereafter, she was allegedly sexually abused by the present appellant and when she was released she was pinched by accused no.3 and it was her specific allegation that the accused – appellant had put a kida (insect) in her private part. The victim has also admitted that she has visited the Court room 5 – 6 times along with her mother and NGO aunty and at that time she had seen the accused appellant in the Court room, needless to say that this could be the reason for identification of the accused in the Court.

7 PW 9 – Lata Shirsat is Investigating Officer. She had taken over the investigation on 6th February 2011 before recording the statement of the victim. She had showed the appellant and one more suspect Punit Kumar Yadav to the victim girl and she had identified the present appellant. PW 9 had recorded her statement in question answer form. She had answered the questions objectively. The spot of incident was shown by the mother of the victim PW1. It is an activity

room which is adjacent to classroom of Jr. Kg. The accused was also identified by the victim at the time of recording of the statement. The Investigating Officer has further admitted that there was no medical evidence, there was only slap given. She had not recorded the statements of teachers, staff and students in the school by visiting the school. It had transpired in the course of investigation, that the present appellant was working as a watchman for secondary school, Punit Yadav was working for primary section. She has categorically stated, that in the course of investigation, it had transpired, that, such an incident had never happened in the school and that too against Tillam Sinh. She had also admitted that the medical report at Exh. 27 clearly shows that hymen was intact at 3.15 pm.

8 Investigating officer has also admitted about the said incident dated 28th January 2011. The appellant has also stated in his statement under section 313 of Cr.PC that on 28th January 2011, he was threatened by Santosh Jaiswal, who happens to be the brother of PW1, that, he would have to suffer dire consequences. In view of this, the learned counsel appearing for the appellant has vehemently submitted that false implication of the accused – appellant is seen on the face of the record.

9 The learned counsel appointed for the appellant has further submitted that no charge was framed against the appellant for offence punishable under section 377 of IPC and in fact the charge was framed under section 376(2)(f) of IPC and therefore, conviction of the appellant for the offence punishable under section 377 IPC is bad in law. Section 377 of IPC reads thus :-

“377. Unnatural offences. - Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation. - Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.”

10 The learned Sessions Judge has observed that since the child was below five years old, the conviction of the appellant should be under section 377 of IPC and the appellant has been acquitted of the charge under section 376(2)(f) of the IPC.

11 The statement of the victim was not recorded under section 164 of Cr.P.C. This Court has perused the statement of PW 7. According

to her, it was the accused no.2 who had put an insect in her private part. The accused no.2 has been acquitted by the learned Additional Sessions Judge. Even according to the prosecution, it was the accused no.2 who had taken the victim to the activity room, detained her and after she was sexually abused he had slapped her and threatened her. No specific reasons are assigned for acquittal of accused no.2 for the charges framed against accused no.2.

12 In fact PW1, the complainant has admitted that on 4th February 2011 the mother of the victim i.e. PW1 was called to the school and asked to apologize as no such incident had occurred, however she did not apologize and proceeded to lodge the FIR on 6th February 2011.

13 The prosecution has failed to prove the guilt of the accused beyond reasonable doubt. Medical evidence also does not corroborate the allegations levelled against the accused. No charge was framed against the accused u/s 377 of IPC. The evidence adduced by the prosecution has not been appreciated in its proper perspective and in accordance with law. The Court cannot be oblivious of the fact that the

accused appellant is acquitted of offence punishable under section 376(2)(f) and the same is not challenged by the State, or the complainant. Moreover, upon seeing the chart of insects, the victim had admitted that, by kida – she meant the same.

14 In view of the above discussion, the appellant deserves to be acquitted of all the charges levelled against him. Hence, following order is passed :-

ORDER

- (i) Appeal is allowed;
- (ii) The judgment and order dated 25th February 2013 passed by the Additional Sessions Judge, Greater Bombay is quashed and set aside. The appellant is acquitted of all the charges levelled against him;
- (ii) Bail bond stands cancelled. Fine amount, if paid, be refunded;
- (iii) Writ be issued expeditiously.

15 Appeal stands disposed of accordingly.

(SMT. SADHANA S. JADHAV, J)