

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 936 OF 2014

Imran Shamim Khan.

Age :22 years, Occ. Nil,

R/o : Plot No. 44/A/7, Road No. 4.

Shivajinagar, Govandi,

Mumbai 400 043.

..Appellant.

V/s.

State of Maharashtra.

(At the instance of Shivajinagar

Police Station, vide C.R. No. 215 of 2013)

..Respondent.

Ms. Nasareen Ayubi, advocate for appellant.

Mr. S.S. Pednekar, APP for State.

CORAM : SMT. SADHANA S. JADHAV,J.

DATE : JANUARY 22, 2019.

JUDGMENT :

1 The appellant herein is convicted for the offence punishable under section 6 of the Protection of Children from Sexual Offences Act, 2012 and is sentenced to suffer R.I. for 10 years and to pay fine of Rs. 2000/- in default to suffer S.I. for 15 days. The appellant is also convicted for the offence punishable under section 506(II) of the Indian Penal Code and is sentenced to suffer R.I. for 1 year and to pay fine of Rs. 500/- I.d. to suffer further S.I. for 7 days by the Special Judge under

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POCSO Act, Gr. Bombay passed in Sessions Case No. 923 of 2013 vide Judgment and Order dated 27/11/2014. Hence, this appeal.

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

(i) It is the case of the prosecution that on 20/7/2013 one Mrs. Meena Fernandes lodged a complaint at the police station alleging therein that her grand-daughter i.e. victim studying in 3rd standard was residing with her and attending school.

(ii) On 19/7/2013 her mother had been to take the victim to her house, but the victim refused. Upon query made by the first informant, she disclosed that 8 days prior, she was sexually assaulted by Imran who was residing near the house of her paternal grand-mother. On the basis of this report, Crime No. 215 of 2013 was registered.

(iii) The statement of the victim was recorded by lady police officer. Her statement was also recorded under section 164 of the Code of Criminal Procedure, 1973.

(iv) After completion of investigation, charge-sheet is filed. The case is committed to Special Court. The case was registered as Sessions Case No. 923 of 2013. The prosecution examined 5 witnesses to bring home the guilt of the accused.

3 Implicit reliance can be placed on the substantive evidence of the victim. At the time recording of evidence, the victim was 9 years old. She expressed her inability to give her date of birth, but has stated that she is 9 years old. She has deposed before the Court that initially, she was residing with her mother and every Sunday she used to visit her maternal grand-mother. That Imran was residing as neighbour of paternal grand-mother. It was a big family. She has uncle to whom she refers as Mamu and Chacha also. She has stated that she does not recollect as to whether, she knows Imran, neither name of her uncle nor the fact that she was taken to hospital. The witness was declared hostile. She was questioned by the Court. However, she gave evasive answers. She has resiled from her earlier statement. In answer to the last question she has stated that **she wants to study and lead a good life.**

4 P.W.2 Meena Fernandes has also turned hostile.

5 It is pertinent to note that the certificate Exh. 23 pertains to the medical examination of the victim. It indicates that the hymen was ruptured. The history was given to the doctor by the victim and her grand-mother. The remarks of the medical officer are as follows :

“Victim gives alleged history of sexual assault 8 days back by known person living in same house. Patient gives alleged

history of sexual assault again two days later.”

6 Perused the statement of the victim and her grand-mother recorded under section 164 of the Code of Criminal Procedure, 1973. In the said statement, the victim has categorically narrated the sexual assault upon her committed by the present appellant. He used to threaten her of dire consequences. That she had disclosed to her mother, however, her mother thought that she is referring to some game and therefore, did not pay attention to it. In June her grand-mother had taken her to her house and admitted her in a different school and therefore, she felt that she could disclose her trauma to her grand-mother and after the said disclosure, her grand-mother had taken her to the police station. Statement under section 164 of the Code of Criminal Procedure, 1973 was recorded in the presence of the grand-mother i.e. P.W.2, as is seen from the statement. It therefore appears that the victim was pressurised to turn hostile at the time of trial and resile from her earlier statement. It is a pathetic situation that although the victim had disclosed to her mother about the heinous act committed by the appellant by subjecting her to sexual abuse, mother had not taken her statement seriously.

7 It is unfortunate that she had reposed faith in her grand-

mother and therefore, without fear she could give her statement under section 164 of the Code of Criminal Procedure, 1973, but at the time of trial, at the behest of her grand-mother and her mother she had turned hostile. It is in these circumstances that the learned Counsel appointed for the appellant has urged that the appellant be acquitted of all the charges.

8 The said submission cannot be taken into consideration as the offence is not just against the individual child but is against the society. In POCSO Act, there is rising trend of the victim turning hostile. It is apparent that before the trial, elder members of the family are won over by the accused and hence, minors would turn hostile. It appears that the accused happens to be close relative and therefore, the family members wanted to suppress the said act. The Hon'ble Apex Court in the case of **Bhagwan Dass v/s. State (NCT) of Delhi reported in AIR 2011 SC 1863** has observed as follows :

“her subsequent denial in the Court is not believable because she obviously had afterthoughts and wanted to save the accused from punishment.”

9 There is ample evidence to indicate that the victim had rather been sexually assaulted. Most of the times, it is the close relative or close acquaintance who would sexually abuse a child and subsequently,

the child is forced to become hostile. Section 29 of the Protection of Children from Sexual Offences Act, 2012 reads as under :

“29. Presumption as to certain offences.- Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7, and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.”

10 Hence, although the victim has turned hostile, onus of proving the innocence would shift on the accused. In answer to all questions, the victim has not stated that the incident is not occurred but has stated that she does not remember. Hence, it would be an evasive answer. She has not denied that it was the appellant who had sexually assaulted her. The learned Special Judge has rightly appreciated the intention of the legislature in introducing the protection of Children from Sexual Offences Act in the year 2012 and has observed as follows :

“The P.O.C.S.O. Act is enacted with specific object, “The law should operate in a manner that the best interest and well being of the child are regarded as being of paramount importance at every stage, to ensure the healthy, physical, emotional, intellectual and social development of the child.” Under this Act the provisions are made to bring such instances of sexual assault on the child in the light by protecting the victim. The object is also that the person of culpable state of mind should be punished for harassing the

child by bringing instances in the light and keep the society child friendly."

11 The learned Counsel for the appellant submits that the evidence of the grand mother is hearsay evidence and therefore cannot be believed. The submission would hold no ground as the victim had disclosed to her grand-mother of horrendous fact, which she had gone through and therefore, P.W. 2 had at that moment, in a state of shock, decided to set the law in motion and see that justice is done to the victim and the accused is punished for the horrendous crime which he had committed. However, the witness resiled at the time of trial because of threat or to save family or won over emotionally by the mother of the victim and the accused. The very fact that the victim had initially disclosed to her mother who had taken it very lightly and then informed her grand-mother about the same only after she was outside the purview of her mother and the accused. At that moment, there was no reason for a child to falsely implicate the accused, much less any body for that matter. This was the first hand information received by the grand-mother which constrained her to set law in motion. It is in these circumstances that hearsay evidence would fall under the exception. It would not necessarily preclude the evidence as to a statement having been made upon which certain action was taken or certain results followed. In the present case, the registration of crime, recording of

statement under section 164 of the Code of Criminal Procedure, 1973 of the victim in the presence of the grand mother and the allegations levelled by the victim being corroborated by medical evidence, leading to filing of charge-sheet is the result which followed promptness of the action taken by the grand-mother.

12 The nature of answers given by the victim at the time of cross-examination needs to be taken into consideration for taking judicial approach. The answers are not in denial. She chooses to forget the incident as she was coerced by her relatives and the accused and she was pained by the fact that she has to forget the incident to protect the accused. And therefore, the answers to all the questions are that she does not recollect. It is for the Court to decide as to whether she does not really recollect or she is being forced to forget.

13 In the case of **Kashmira Singh v/s. State of Madhya Pradesh, reported in AIR 1952 SC 159**, the Apex Court has held that -

“The proper way to approach a case of this kind is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then it is not necessary to call the confession in aid. But cases may arise where the judge is not prepared to act on the other

evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify him-self in believing what without the aid of the confession he would not be prepared to accept."

14 Similarly in the case of **Ashok Kumar Raut & anr. v/s. State of Bihar reported 2006 Cr. L.J. 3362**, it is held that where a witness turning hostile before the court, his previous statement made before the Magistrate at the earliest opportunity under [Section 164](#) Cr.P.C. must get some credence if it is being corroborated on material points by other evidence.

15 In the present case, the prosecution has examined the Magistrate who recorded the statement of the victim under section 164 of the Code of Criminal Procedure, 1973 and has proved the contents of the document recorded under section 164 of the Code of Criminal Procedure, 1973. It is very easy to say that the prosecution has failed to prove the guilt of the accused. However, in a case like the present one, the judicial approach necessarily has to see that justice is imparted to victim as well. This Court is therefore, of the opinion that there would be no impediment in upholding the Judgment of the trial Court and maintaining the conviction recorded by the trial court.

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16 In the above mentioned circumstances, no interference in the findings recorded in Judgment of the learned Special Court is warranted. Hence, the Appeal stands dismissed.

17 The learned counsel appointed for the Appellant has put in the best of her efforts to espouse the cause of the Appellant, hence, she is entitled for her professional fees as per Rules, to be paid by High Court Legal Aid Committee.

[SMT. SADHANA S. JADHAV, J.]