



IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.223 OF 2017

Raju @ Pralhad Vitthal Naik C/6605)
Age 23 years, Occ:)
Convict presently lodged at Kolhapur)
Central Prison Kamlamba,)Appellant.

V/s

State of Maharashtra)
(At the instance of Police Station)
in respect of CR No.20 of 2013)Respondent.

Ms. Megha Bajoria for the Appellant.
Mr. S.R. Agarkar, APP for the Respondent/State.

CORAM: NITIN W. SAMBRE, J.

Judgment reserved on 05/08/2020
Judgment pronounced on 19/08/2020

JUDGMENT:

1] Appellant/Accused Raju alias Pralhad Vitthal Naik was convicted for the offence punishable under Section 376(2)(i) of the Indian Penal Code and was sentenced to suffer rigorous imprisonment for 15 years and to pay fine of Rs 5,000/- and in default of payment of fine to suffer simple imprisonment for one month.

He was further convicted for the offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the “POCSO Act”) and was sentenced to under go the same punishment as was ordered under Section 376(2) (i) of I.P.C.

Appellant/Accused was further convicted for the offence punishable under Section 377 of the Indian Penal Code and was sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs 5000/- and in default of payment of fine to suffer simple imprisonment for one month.

He was further convicted for the offence punishable under section 3(1)(iii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 [hereinafter referred to as the “S.C. & S.T. (Prevention of Atrocities) Act”] and was sentenced to suffer rigorous imprisonment for six months and to pay fine of Rs 1000/- and in default of payment of fine to suffer simple imprisonment for fifteen days.

Appellant/Accused was further convicted for the offence punishable under section 3(1)(xi) of the S.C. & S.T. (Prevention of Atrocities) Act and was sentenced to undergo the same punishment as was ordered under Section 3(1)(iii) of the S.C. & S.T. (Prevention of Atrocities) Act.

Appellant/Accused was, however, acquitted of the offences punishable under Section 3(1)(ii), 3(1)(xii) and 3(2)(v) of the S.C. & S.T. (Prevention of Atrocities) Act. As such this Appeal.

2] Facts as are necessary for deciding the present appeal are as under:-

3] The complainant Maya P.W.1 – mother of the victim, was residing with victim who was six years old at the relevant time i.e. on 08/02/2013. Since the victim girl was not keeping well, she had not gone to School. The complainant, in view of the above, had also not gone for work. Her husband i.e. father of the victim went for agricultural labour work. The victim girl was playing in adjoining area

when the Appellant/Accused lured the victim by offering her chocolate and other eatables and committed rape. It is also claimed that the Appellant committed an offence punishable under Section 377 of the Indian Penal Code by inserting his private part in the mouth of the victim girl. It is also alleged in the complaint-Exhibit-11 that the Appellant/Accused knowing fully well that the victim belongs to Scheduled Caste ("Mang" caste), outraged her modesty as woman. After receipt of the complaint by P.W. 7 – Vitthal Shivaji Darade, PSI, the offence bearing No. 20/13 punishable under Sections 376(2)(f), 377 of the I.P.C. and 3(1),(ii),(iii),(x) and (xi) and 3(2)(v) of the S.C. & S.T. Act and Sections 4, 5 and 6 of the POCSO Act came to be registered. The victim girl was referred for medical examination with her grand mother. The clothes of the victim girl which she was wearing at the time of offence were seized vide seizure panchanama-Exhibit-16 and accordingly the investigation was set in motion.

4] P.W. 8- Kavita Chandrashekhar Nerkar, Dy.S.P. who is examined at Exhibit-31 has deposed that she immediately arrested the Accused and on the very same day, after making endorsement on the complaint, seized his clothes vide seizure panchanama-Exhibit-18.

She accordingly referred the Accused for medical examination. On the next day, she has drawn spot panchanama-Exhibit-14 and also recorded statement of the victim and her relatives..

5] On 12/02/2013, she sent the seized muddemal and samples received from medical officer to Chemical Analyser vide Exhibit-32.

6] Since incriminating evidence was available against the Accused, he was chargesheeted and charge was framed against the Accused at Exhibit-4 on 31/07/2014 for the offence punishable under Section 376(2)(f) and Section 377 of I.P.C. and Section 3(1),(ii),(iii),(x) and (xi) and 3(2)(v) of the S.C. & S.T.(Prevention of Atrocities) Act. Charge was also framed against the Accused for the offence punishable under Sections, 3, 4, 5(m) and 6 of the POCSO Act. Since the Accused pleaded not guilty, trial was set in motion.

7] Prosecution, in order to prove the guilt of the Accused, examined eight witness viz P.W. 1 - Maya Sambhaji Jadhav, mother of the victim at Exhibit-10, P.W. 2 – victim at Exhibit-12, P.W. 3 – Vaibhav Nanaso Patil, panch witness at Exhibit-13 to seizure panchanama at

Exhibit-14, P.W. 4 – Tanaji Appasaheb Nagargoje, panch witness at Exhibit-15 to seizure panchanama at Exhibit-16 under which clothes of the victim i.e. red coloured slacks and one green coloured top were seized, P.W. 5 – Malhari Tukaram Kamble, panch witness at Exhibit-17 to seizure panchanama-Exhibit-18 under which the clothes of the Accused i.e. blue coloured underwear and chocolaty coloured full pants and chocolaty coloured full banian having dried blood stains came to be seized, P.W. 6 – Dr. Amit Prakash Chougule is examined at Exhibit-26, who has examined the victim girl, P.W. 7 – Vitthal Shivaji Darade, Station House Officer is examined at Exhibit-30 and P.W.8 – Kavita Chandrashekhar Nerkar, Investigating Officer is examined at Exhibit-31.

8] From the record, it appears that charge was altered vide Exhibit-40 on 27th June, 2016 for the offence punishable under Section 376(2)(i) and Section 377 of I.P.C. and Sections 3(1)(ii), (iii), (xi), (xii) and 3(2)(v) of the S.C. & S.T. (Prevention of Atrocities) Act and Section 6 of the POCSO Act. Needless to say that the charge perhaps was altered based on the evidence available on record.

9] As such, in view of amendment to Section 376, the Appellant/Accused was charged with offence punishable under Section 376(2)(f) being in a position of trust or authority towards the victim girl and has committed an offence of rape, under Section 377 i.e. carnal intercourse against the order of nature, under Section 3(1)(ii), (iii), (xi), (xii) and 3(2)(v) of the S.C. & S.T. (Prevention of Atrocities) Act and Sections 3, 4, 5(m) and section 6 of the POCSO Act.

10] The mother of the victim who is examined at Exhibit-10 has in categorical terms deposed that the victim girl is aged about six years and on the date of the incident i.e. on 08/02/2013 had not gone to the school as she was suffering from cold. According to her, at about 1.00 P.M., victim girl went to the house of neighbour viz Jamage for playing and since she had not returned after 2 O' clock, P.W.1 noticed her chappal outside the house of the Accused. She having not noticed her at Jamage's house, when she gave call, the Accused opened the door. P.W. 1 entered the house of the Accused and saw that her daughter was present in the house of the Accused and she was having only top on her body and she was not having pant or knickers. According to her, her daughter started crying and upon inquiry, she

narrated about the heinous act of rape committed by the Accused under the pretext of giving her chocolate and eatables. She further claimed that the Accused has made the victim bring a bottle of oil, made her lie on the floor, removed her clothes and applied oil to her private part and inserted his private part in the mouth of the victim. She has also stated in her testimony that since the victim sustained pain, she started shouting and crying. As a consequence, the Accused committed an offence under Section 377 by inserting his private part in the mouth of the victim. P.W. 1 informed that she immediately intimated about the incident to her sister-in-law who called her husband so also her own husband. They accordingly narrated the incident to mother of the Accused. She has accordingly proved contents of the complaint-Exhibit-11. She has identified clothes of the victim i.e. Articles 1 and 2. In her cross examination, She has admitted that adjacent to the house of the Accused, the house of one Jamage is situated and adjacent to the same, the houses of Priyanka Koli and Didi Biranage are located. She further admitted that one can hear loud voice from the house of the Accused in her house. According to her, since her daughter started complaining about abdominal pain, she was taken to hospital.

11] P.W. 2 – victim, who is examined at Exhibit-12, has sworn on the aforesaid lines.

12] As far as the evidence of aforesaid two witnesses is concerned, it is required to be noted that the prosecution has not seized the chappal of the victim girl which was an important link in the evidence as trace of the victim girl was taken at the house of the Accused from the same. Apart from above, it is claimed by P.W.1 – complainant that she has narrated the incident to her relative viz. sister-in-law. However, neither the statement of her sister-in-law nor of neighbours viz. Jamage, Priyanka Koli and Didi Biranage are recorded so as to support the case of the prosecution.

13] Though it is claimed that incident occurred at about 2.00 P.M. in the afternoon, whereas from the record it appears that the complaint came to be lodged with the Police Station at about 9.25 P.M.

14] P.W. 3 – Vaibhav Nanaso Patil, who is examined at Exhibit-13,

has proved recovery of oil bottle seized from the spot of incident which is Article-6 and spot panchanama at Exhibit-14 whereas P.W.4 – Tanaji Appasaheb Nagargoje who is examined at Exhibit-15 has proved recovery of the clothes vide Exhibit-16. P.W. 5 – Malhari Tukaram Kamble who is examined at Exhibit-17 has proved seizure of the clothes of the Accused vide Exhibit-18 and Articles 3, 4 and 5. All these Articles were sent for chemical analysis under the signature of P.W.8 – Investigating Officer and so far as the report of Chemical Analyser is concerned i.e. Exhibits-22 to 25, it is brought on record that no blood was detected in the Nail Clippings of the victim, no semen was detected on Nail Clippings, vaginal swab and oral swab. On the banian of the Accused, blood stains were noticed of which Blood Group was inconclusive, so also no semen was detected on the banian. As far as slack of the victim, her top (frock), underwear of the Accused and full pants of the Accused are concerned, no blood or semen was detected thereon. Though the prosecution story is that the Accused has used an oil as lubricating agent, no oil stains or residues were noticed on the slack of the victim, her top (frock) and underwear, pants and banian of the Accused. Similarly, no blood was detected in the Nail Clippings of the victim so also on the pubic hair of

the Accused. The Blood Group of the Accused was found to be 'B' whereas Blood Group of the semen of the Accused remained inconclusive.

15] P.W. 6 – Dr. Amit Prakash Chougule who is examined at Exhibit-26, has deposed that he has examined the victim girl on 08/02/2013 i.e. day of the incident and stated that upon physical examination of the victim girl, he has noticed no external injuries on her person. According to him, her secondary sexual characters were not developed and no injuries could be noticed to her private parts. Upon local examination, he noticed that her labia and hymen were normal and there was no tear. He has noticed no injuries on the private parts of the victim. Upon X-ray examination, ossification test was conducted and her age was certified to be 5 to 6 years. In the history narrated by the victim at the time of examination, victim has stated that the Accused lured her by giving money. In his cross-examination, he has admitted that if there is sexual assault on the girl like the present victim who is aged 5 to 6 years of age, there is every possibility of external and internal injuries to private part which is absent in the case in hand. He has also deposed that if there is any injury, same will

be a bleeding one.

16] If we peruse Exhibits-27 and 28 i.e. Certificates issued by P.W. 6 – Dr. Amit Prakash Chougule, Exhibit 27 - Certificate in regard to victim girl gives her approximate age as between 5 to 6 years. Doctor then opined that there is not external injury to genitals or inside her mouth. No external injuries over the body of the victim could be noticed. It also certifies that no semen or traces of semen were seen around genitals or body of the victim. Similarly, Exhibit 28 – Medical Certificate of the Appellant certifies that no external injuries noted over the genitals or any other external injury over his body. It also certifies that no traces of semen near genitals or on the body were noticed.

Based on the above, P.W.6 in categorical terms answered in his cross-examination that, as there was no injury to the private part of the victim, it can be said that there was no sexual intercourse. There is no evidence brought on record through testimony of P.W.6 so as to claim that offence under Section 377 i.e. carnal sex could be noticed. The aforesaid evidence given by P.W.6 - doctor is further confirmed

through the report of Chemical Analyser as discussed in foregoing paragraphs.

As such, the necessary ingredients of Section 6 of the POCSO Act also cannot be inferred for want of trustworthy evidence on record.

17] Vide Exhibit 40, on 27/06/2016, charge was re-framed against the Accused i.e. for an offence punishable under Section 376(2)(i), Section 377 of IPC and Section 3(1)(ii), 3(1)(iii), 3(1)(xi), 3(1)(xii), Section 3(2)(v) of the S.C. & S.T. (Prevention of Atrocities) Act and Section 6 of the POCSO Act.

18] As such, on one hand evidence of the victim girl and her mother speaks of the offence committed by the Accused which has resulted into re-framing of the charge at Exhibit-40 whereas it is the case of the Accused that because of enmity based on caste, he is falsely implicated.

19] Evidence of P.W. 6 – doctor and evidence on record in the form of Chemical Analyser's Report i.e. Exhibits 22 to 25 corroborates that

there was no sexual assault particularly one which could be punishable under Section 6 of the POCSO Act or under Section 376(2)(i) of the IPC as was existing before the amendment of 2018 entered in the statute book. Rather the evidence of P.W.6 does not speak of any aggravated penetrative sexual assault or rape on the victim girl, as the allegations are not at all corroborated by the medical evidence.

20] It is desirable that there should be medical evidence on record particularly in the backdrop of the allegations made by the victim against the Accused so as to atleast infer that the Appellant had tried to penetrate as is claimed by the victim.

Mother of the victim has rather stated that there was foul odour from the mouth of the victim girl and accordingly she was subjected to medical examination wherein from the testimony of P.W. 6 – doctor, no injury could be found inside the mouth or to the genitals of the victim girl. It is also confirmed from the report of the Chemical Analyser that there were no stains of semen or blood stains over the clothes, private part and genitals of the victim or Accused or nearby mouth or over the body of the victim.

21] In the aforesaid backdrop, the claim as has been put-forth by the prosecution against the Accused of commission of offence punishable under Section 377 of IPC also cannot be inferred.

22] The evidence of the Investigating Officer i.e. P.W. 8 though speaks of mother of the victim inquired with the neighbour Mr Jamage to whose house the victim claimed to have gone for playing, however, as stated hereinbefore, neither the statement of the said neighbour was recorded nor was he examined. It appears from the testimony of Investigating Officer, victim and her mother that witnesses were residing in very close proximity and nobody has heard any cry of the victim girl.

23] As such, the statement of the victim or her mother does not appear to be natural or trustworthy and medical evidence so also documentary evidence in the form of Chemical Analyser's Report does not corroborate their claim. That being so, conviction of the Accused for the offence punishable under Section 377 of IPC is not sustainable.

24] As far as offence under the provisions of the S.C. & S.T. (Prevention of Atrocities) Act is concerned, through the evidence of P.W.1 and P.W.2 certificate that the victim was belonging to reserved category and as such enjoyed the protection under the said Act is not brought on record. There is no allegation that the Appellant has committed crime keeping in mind the fact that the victim belongs to reserved category.

25] Perusal of the F.I.R. i.e. Exhibit-11 dated 08/02/2013 does not speak that Appellant had an intention of committing crime under the provisions of S.C. & S.T. (Prevention of Atrocities) Act and as such once it is established that there is no material evidence on record to infer involvement of the Accused in the crime punishable under Section 376(2)(i) of the IPC or Section 6 of the POSCO Act and Section 377 of the IPC, conviction of the Appellant under the provisions of even S.C. & S.T. (Prevention of Atrocities) Act is not sustainable. As such, conviction of the Appellant/Accused in the case in hand is liable to be quashed and set aside.

26] In the result, following order is passed :-

ORDER

(I) Appeal is allowed. The conviction of the Appellant/Accused is quashed and set aside.

(II) Appellant/Accused is acquitted of the offences punishable under Sections 376(2)(i) and 377 of IPC, under Section 6 of the POCSO Act and under Sections 3(1)(ii), (iii), (xi), (xii), 3(2)(v) of the S.C. & S.T. (Prevention of Atrocities) Act.

(III) Appellant/Accused be released forthwith, if he is not required in any other case. Fine amount, if deposited, is directed to be returned to the Appellant/Accused.

(NITIN W. SAMBRE, J.)