

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.166 OF 2017

Mahadev Asaraji Borade	]	
Age about 52 years,	]	
Occupation : Retired,	]	
Balam Takali, Taluka – Shergaon,	]	
District – Ahmednagar.	]	
(At present lodged at Central Prison)	]	Appellant (Original Accused No.1)

Versus

1.	The State of Maharashtra	]	
	(Through Police Inspector,	]	
	Narayangaon Police Station,	]	
	District Pune.)	]	
2.	The victim	]	Respondents

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Ms. Nasreen Ayubi, for the Appellant.

Ms. M.H. Mhatre, A.P.P, for Respondent No.1-State.

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CORAM : PRITHVIRAJ K. CHAVAN, J.

RESERVED ON : 28TH JANUARY, 2020.

PRONOUNCED ON : 27th FEBRUARY, 2020.

JUDGMENT:

This is an appeal against the judgment of conviction and sentence delivered by the Special Judge under the provisions of the Protection of Children from the Sexual Offences Act, Khed,-Rajgurunagar, District-Pune on 4th October, 2016 by which the appellant has been convicted as under;

The appellant has been convicted of an offence punishable under section 354 of the Indian Penal Code (for short 'I.P.C') and has been sentenced to suffer Rigorous Imprisonment for one year with fine of Rs.1,000/-, in default, Rigorous Imprisonment for two months.

The appellant has further been convicted of an offence punishable under section 506 of the I.P.C and has been sentenced to suffer Rigorous Imprisonment for two years with fine of Rs.1000/-, in default, Rigorous Imprisonment for two months.

The appellant has been convicted of an offence punishable under section 8 of the Protection of the Children from Sexual Offences Act, 2012 (for short 'POCSO') and has been sentenced to suffer Rigorous Imprisonment for three years with fine of Rs.1000/-, in default, to suffer Rigorous Imprisonment for two months.

The appellant has been convicted of an offence punishable under section 10 of the POCSO Act and has been sentenced to suffer Rigorous Imprisonment for five years with fine of Rs.1000/-, in default, to suffer Rigorous Imprisonment for two months.

The trial Court, *inter alia*, directed that an amount of Rs.3000/- shall be paid to the victim as a compensation from the fine amount, if recovered from the appellant.

The appellant, however, has been acquitted of an offence punishable under section 376 of the I.P.C and under sections 4 and 6 of the POCSO Act.

2. Brief facts are as follows:

The victim is an inhabitant of Village Kharapudi, Taluka-Khed, District-Pune. She is 60% handicapped. In the month of June, 2011, she had secured admission in 3rd standard at *Bhausahab Bora Apang Kalyan Kendra at Ane*. She was accommodated in the Hostel of the said School with other girls. Her mother intermittently used to visit the Hostel. The appellant was working as a Peon of the said School.

About a year ago, when the victim was in her classroom, the appellant came over there during the recess and stated that the victim had a phone call from her mother. He informed that her mother would again call her after some time. The victim, therefore, came out of the classroom and accompanied with the appellant to the storeroom where the phone was installed. After having a conversation with her mother, when the victim was about to leave the storeroom, the appellant closed the door from inside. He threatened the victim and then embarrassed her. The appellant squeezed her breast. He removed her nicker and inserted his finger into her vagina. Thereafter, the appellant laid the victim on the floor and lied on her person. The victim raised shouts due to which he left her. The victim said that she would inform the said incident to the teacher. However, the appellant again threatened her that he would cause her death. Due to such fear, the victim did not disclose the incident to anyone. The appellant thereafter again sexually assaulted the victim and threatened her to cause her death.

3. At the relevant time, accused No.3 Savleram Pacharane (since acquitted by the trial Court) called the victim and other girls. One more accused i.e accused No.2-Vasant Gite (since deceased) was also summoned in the office by the accused Savleram Pancharane. Thereafter, accused Savleram Pancharane reduced the complaint of the victim in writing and obtained her signature.

4. On 6th April, 2013, the victim went to her native place after the annual examination. On 15th April, 2013, a lady Police Officer of Narayangaon Police Station had visited the house of the victim along with one Mangaltai Netaji Kolhe, a Social Worker. After an inquiry with the victim girl, they realized about the crime committed by the appellant. Accordingly, victim's mother lodged a report with the Police.

5. A crime bearing No.104 of 2013 under section 376-B, 323, 354 and 506 of the I.P.C and section 5 and 8 of the POCSO Act came to be registered. Investigation has been carried out by P.S.I-Prabhakar Kawale. He visited the scene of occurrence and drew a spot panchanama. He had recorded statements of the witnesses and referred the victim to Sassoon Hospital, Pune, for medical examination. Statement of the victim under section 164 of the Cr. P.C came to be recorded by the J.M.F.C, Junnar. After arrest of the appellant, he too was referred to a Hospital at Junnar to collect his nail clippings, semen, blood and pubic hair. The appellant made a statement while in the Police custody that he would produce the weapon of offence i.e a stick with which he had threatened the victim. Accordingly, a Memorandum Panchanama was drawn and at the behest of the appellant, the stick came to be discovered at his instance. After investigation, a charge-sheet has been filed against the appellant.

6. Upon his appearance before the Special Court, a charge was framed under the relevant sections against the appellant and Savleram Pancharane. By that time, accused No.2-Vasant Gite expired and, therefore, the trial abated *qua* accused No.2-Vasant Gite. The charge was explained to the appellant in vernacular to which he pleaded not guilty and claimed a trial. The defence as emerged from the cross-examination as well as from the statement under section 313 of the Cr. P.C is denial of the offence alleged and false implication in this case.

7. To substantiate the charge, the prosecution examined in all eight witnesses.

8. The learned Sessions Judge after hearing the prosecution and the defence and after going through the evidence of the prosecution witnesses found the appellant guilty as above.

9. Heard Ms. Nasreen Ayubi, learned Counsel for the appellant. With the assistance of the learned Counsel, I have gone through the evidence of the prosecution witnesses. It is argued by the learned Counsel that there is an un-explained delay in reporting the matter to the Police as is evident from the record that the incident in question had occurred a year prior to 6th April, 2003. It is submitted that P.W.3-Sandip Aher has turned

hostile and the evidence of the victim's mother-P.W.4 is hearsay in nature. The learned Counsel has also drawn my attention to the report of the Chemical Analyst which is negative. She testified that the victim had not testified anything as regards rape. The learned Counsel has, therefore, prayed for giving a benefit of doubt to the appellant.

10. On the other hand, learned A.P.P strongly supported the impugned judgment and order of conviction by contending that the appellant who was supposed to take care of the victim and other girls had molested the victim who is physically and mentally handicapped. It is submitted that the evidence of the victim remained un-rebutted and un-shattered during the cross which finds substantial corroboration from the medical evidence. The learned A.P.P has drawn my attention to the fact that the appellant had already been convicted and sentenced in Special POCSO Case No.4 of 2014 and has been undergoing life imprisonment.

11. The victim in her evidence testified as to how the appellant used to misbehave not only with her but also with other inmates in the Hostel. She categorically deposed that the appellant used to take her to the storeroom under the pretext of telephone call from her mother. He thereafter used to shut the door, remove her nicker and used to lie on her person. The victim testified that she was threatened by the appellant to

cause her death in case she narrates the incident to the teacher. He had committed such act twice with her. The testimony of the victim is substantially corroborated by P.W.2-Dr. Daksha Bilagi who examined the victim on 17th April, 2013. The history alleged to have been given by the victim is that the appellant put her on the floor, took off her clothes completely as well as his clothes and thereafter put his two fingers in her vagina followed by his penis. It is further testified by P.W.2- Dr. Daksha Bilagi that the appellant also grabbed her breasts and pressed it. When the victim called for help, the appellant shut her mouth with his hands.

12. On examination of the victim, P.W.2- Daksha Bilagi noticed that her hymen showed old healed rupture at 8'O clock position with hymnal tag. There was no surface injury or marks on her body. There was white discharge in vagina. The witness had taken samples of vaginal smear, vaginal swab and pubic hair. Medical certificate is proved at **Exhibit 82**. It is opined by this witness that from clinical examination and findings, it can be said that the victim was subjected to penetrative vaginal intercourse. There is no effective cross-examination.

13. P.W.4 is the victim's mother. She has supported version of her daughter to a considerable extent. According to this witness, the victim was inquired with by the Police who narrated the act of the appellant in the storeroom of the Hostel. Her evidence, though hearsay in nature, yet there

is no reason to disbelieve her testimony which is in consonance with the evidence of the victim. There is no effective cross-examination of P.W.4 and there is no reason for lodging a false complaint against the appellant. A suggestion was given to the victim's mother that at the instance of Police Inspector P.I Sarangkar and Vilas Ramakant Pandhare, she had filed a false report against the Institute and the teachers, for, she would get compensation of Rs.20,00,000/- from the Government. However, the witness had denied the suggestion. P.W.5-Jyoti Patil-Assistant Police Inspector who was attached to Talegaon Dabhade Police Station conducted investigation into the crime.

14. The learned trial Judge has correctly and properly appreciated the entire evidence and facts on record. It has been rightly observed that no ostensible reason has been suggested as to why the victim would falsely implicate the accused for the commission of such a heinous offence especially in the light of the fact that the victim is handicapped. No sane man will believe that parents of the victim, at the cost of reputation of the family and future of the victim, would go to the Police Station and falsely implicate the appellant on the charges of rape.

15. The testimony of the victim vis-a-vis testimony of the Medical Officer and her mother, if considered in its totality found to be acceptable, believable and trustworthy. I do not find any reason to disbelieve their

evidence. As a matter of fact, there is no question of insisting for further corroboration to the testimony of the victim which would tantamount adding insult to her agony.

16. The Hon'ble High Court in the case of **Santosh Moolya and another Vs. State of Karnataka reported in 2010 (2) B. Cr.C. 718 (SC)** has observed;

“Any statement of rape is an extremely humiliating experience for a woman and until she is a victim of sex crime, she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the Courts must always keep in mind that no self-respecting woman would put her honour at stake by falsely alleging commission of rape on her and therefore, ordinarily a look for corroboration of her testimony is unnecessary and uncalled for”.

The ratio laid down by the Supreme Court is squarely applicable to the present set of facts. The victim is a handicapped gullible minor residing in a hostel with hostile environment had to face the obnoxious act of the appellant who had threatened her and therefore, it is obvious that there would be some delay in reporting the matter to the Authorities due to fear. It is a settled principle of law that the evidence of the victim girl in case of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable.

17. The Supreme Court in the case of **State of Maharashtra Vs. Chandraprakash Kewalchand Jain reported in 1990 (1) SCC 550** observed thus;

“A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under section 118 and her evidence must receive the same weight as is attached to an injured in cases of physically violence. The same decree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the Court is entitled to base a conviction of her evidence, unless the same is shown to be infirm and not trustworthy. If the totality of

the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged. The Court should ordinarily have no hesitation in accepting her evidence”.

18. The trial Court has rightly observed that there is no evidence, much less, oral evidence of the victim as regards rape upon her by the appellant and, therefore, it is observed that the prosecution has failed to prove that the appellant had committed penetrative sexual assault upon the victim or for that matter, committed aggravated penetrative sexual assault.

19. Thus, the learned trial Court has rightly appreciated all the facts, circumstances and evidence on record and reached a correct conclusion by convicting the appellant as above. I do not find any reason to interfere with the impugned judgment. The appeal is devoid of merits and hence stands dismissed.

[PRITHVIRAJ K. CHAVAN, J.]