

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.443 OF 2014

ZHAKIR MEHFUJ ALAM SHAIKH)
Age : 49 years, Occupation : Nil)
R/at : A/02, Sky Bird Building,)
Near Little Flower School, Samelpada,)
Nalasopara (West), District Thane)
At present in Thane Central District Jail)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Shri.Daulat Khamkar, Advocate for the Appellant.

Shri,H.J.Dedhia, APP for the Respondent – State.

**CORAM : PRASANNA B. VARALE &
V. G. BISHT, JJ.**

DATE : 25th SEPTEMBER 2020

JUDGMENT : (PER : V. G. BISHT, J.)

1 The instant criminal appeal under Section 374(2) of the Code of Criminal Procedure (Cr.P.C.) has been preferred by the appellant-accused aggrieved by the judgment and order of conviction and sentence passed by the Additional Sessions Judge,

Vasai, District Thane, in Special Case No.05 of 2013 dated 26th March 2014 by which the Additional Sessions Judge convicted the appellant-accused for the offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as POCSO Act for the sake of brevity) and sentenced him to undergo life imprisonment with fine of Rs.10,000/- (Rupees Ten Thousand Only) and in default of payment of fine, directed to undergo further rigorous imprisonment for a period of 2 years. The Additional Sessions Judge further convicted the appellant-accused for the offence punishable under Section 506, 323 of the Indian Penal Code (IPC). The Additional Sessions Judge sentenced the appellant-accused for the offence punishable under Section 506 of the IPC to undergo rigorous imprisonment for a period of 1 year with fine of Rs.2,000/- (Rupees Two Thousand Only) and in default of payment of fine, directed to undergo further rigorous imprisonment for a period of 2 months. The Additional Sessions Judge further sentenced the appellant-accused for the offence punishable under Section 323 of the IPC to undergo rigorous

imprisonment for a period of 6 months with fine of Rs.1,000/- (Rupees One Thousand Only) and in default of payment of fine, directed to undergo further rigorous imprisonment for a period of 1 month. In addition, the Additional Sessions Judge directed the appellant-accused to pay compensation of Rs.1 lac (Rupees One Lac Only) each to both survivors. The Additional Sessions Judge ordered both the sentences to run concurrently. The Additional Sessions Judge was pleased to grant benefit of set-off as per Section 428 of the Cr.P.C. for the period during which the accused remained in jail as an under-trial prisoner.

2 As noted by the Hon'ble Apex Court in **Bhupinder Sharma vs. State of Himachal Pradesh**¹ that the mandate of not disclosing identities of the victims of sexual offence under Section 228-A of the IPC ought to be observed in spirit.

“2 We do not propose of mention name of the victim. Section 228-A of the Indian Penal Code, 1860 (in short the ‘IPC’) makes disclosure of identity of victim of certain offences punishable. Printing or publishing name of any matter which may make known the identity of

¹ AIR 2003 SUPREME COURT 4684 : (2003) 8 SCC 551

any person against whom an offence under Sections 376, 376-A, 376-B, 376-C or 376-D is alleged or found to have been committed can be punished. True it is, the restriction does not relate to printing or publication of judgment by High Court or Supreme Court. But keeping in view the social object of preventing social victimization or ostracisms of the victim of a sexual offence for which Section 228-A has been enacted, it would be appropriate that in the judgments, be it of High Court or lower Court, the name of the victim should not be indicated. We have chosen to describe her as 'victim' in the judgment.”

3 We are, thus, not disclosing the victims’ name and instead are referring to them as “victims” throughout this judgment.

4 The necessary facts are to the following effect :-

(a) Informant Samina Zakir Shaikh is the mother of victim boy – aged 12 years and victim girl – aged 11 years. The appellant-accused is her second husband. The said victims are her children from her first husband.

- (b) The prosecution alleges that after the marriage, the appellant-accused started harassing and beating victims on trifling reasons. The victims used to behave in a frightening way whenever the appellant-accused used to be present in the house. On 28th June 2013, when the appellant-accused was not present in the house, the informant-mother took the victims into confidence and started enquiring. Victim boy started crying and informed his mother that since last two years, he is being exploited sexually by way of unnatural sex and also told about the beatings given by the appellant-accused by means of a bat. Similarly, when informant-mother confronted the victim girl, she also informed about her sexual exploitation since last two years and further told that the appellant-accused, after removing her clothes, used to fiddle with her private part and after embracing, many times attempted forcible sexual intercourse. Both victims also informed about the death threats given to them, in the event if the sexual exploitation is revealed to the mother-informant.

- (c) The informant, accordingly, lodged the First Information Report (FIR) which was registered vide Crime No.419 of 2013 with Nalasopara Police Station for the offences punishable under Sections 376, 377, 323, 504 and 506 of the IPC as also under Sections 8 and 10 of the POCSO Act. The investigation was taken up by PW5 Investigating Officer. Both the victims were referred to PHC Nalasopara. The Investigating Officer, during the course of investigation, also seized the clothes of the victims, recorded their statements, collected their School Leaving Certificates and sent the necessary articles to Forensic Science Laboratory. After receiving Chemical Analyser's Reports and on completion of investigation, the Investigating Officer forwarded the charge-sheet against the appellant-accused under Section 173 of the Cr.P.C. to the Court of Additional Sessions Judge, Vasai.
- (d) To substantiate the Charge against the appellant-accused, the prosecution has examined as many as six witnesses. The appellant-accused was questioned under Section 313 of the

Cr.P.C. about the incriminating evidence and circumstances and the appellant-accused denied all of them as false. According to him, he had seen the victims together in an objectionable position and therefore, they have deposed falsely against him. However, there used to be regular quarrel between him and his wife.

- (e) Upon appreciation of oral evidence, the trial court convicted the appellant-accused for the offences punishable under Section 6 of the POCSO Act and under Sections 506 and 323 of the IPC and sentenced him in the manner stated hereinabove. Hence, this appeal.

5 Shri. Khamkar, learned counsel for the appellant-accused, has raised before us threefold objections and has seriously questioned the conviction and punishment awarded by the learned trial Court. The first submission of learned counsel is that there is delay in lodging the FIR and on this count alone, the alleged prosecution case deserves to be questioned. Secondly,

there is lot of inconsistencies amongst the versions of the victims and their mother vis-a-vis the contents of the FIR. The learned counsel took us through the testimonies of the material witnesses viz., PW1 and PW2 victims and then through the testimony of PW3 informant and emphasized how all of them are at loggerheads. Thirdly, the whole case of penetrative sexual assault is doubtful, having regard to the medical evidence led on record by the prosecution.

6 Shri.Dedhia, learned APP, on the other hand, has vehemently opposed all the submissions raised by the learned counsel for the appellant-accused. The learned APP also took us through the evidence and also through the reasonings given by the learned trial Court and forcefully submitted that the whole evidence led by the prosecution is properly marshalled and appreciated in proper perspective and further, there is no room for interference at the hands of this court. Having regard to the seriousness of the offence, in his opinion, the learned trial Court has not only rightly convicted the appellant-accused but the

punishment is proportionately awarded. There being no merit in the appeal, the same deserves to be rejected out-rightly, argued learned APP.

7 Having regard to the nature of accusations, we have, with the help of the learned counsel and the learned APP, very carefully gone through the evidence on record and in our considered opinion, learned counsel for the appellant-accused has not made out any case on merits which necessarily warrants interference. We qualify this statement with reasons.

8 Out of six prosecution witnesses examined, there are four material witnesses viz., PW1 to PW4. We begin with the evidence of PW3 informant-mother.

9 PW3 informant-mother testifies (Exh.20) that accused is her husband, victim boy and victim girl are her children and they were begotten from her first marriage. The date of birth of victim boy is 29th April 2001 whereas that of victim girl is 28th

April 2002. At the relevant time, victim boy was in 7th standard and victim girl was studying in 6th standard. Victims used to have holiday on Saturdays and Sundays. They used to attend tuition from Monday to Friday between 4 p.m. to 6 p.m. and on Saturday in the morning from 9 a.m. to 11.00 a.m. At the relevant time, she was employed with Brilliant Classes, Nalasopara and her working hours were from 6.30 a.m. to 3.00 p.m. She used to have holiday on Friday and so the appellant-accused.

10 It is her further evidence that, after sometime of marriage, she found that the appellant-accused used to beat the children with belt and she even saw the beating marks on the person of the children. On 23rd June 2013, she found that her both children were in a frightened state and she suspected that something wrong has occurred with them. When she asked them about the same, they did not tell her anything, as the appellant-accused was at home. Thereafter, on 26th June 2013, when her husband was not at home, she took the children into confidence and asked them as to what had happened. At that time children

were crying but since the appellant-accused came back, they did not tell her anything. On 28th June 2013, she took half day leave from her work and came home early and asked the children again about things happened with them. At that time, victim boy told her that since last two years, on Saturdays and Sundays, appellant-accused used to remove his clothes and had unnatural sex with him. He also told her that the appellant-accused used to insert his private part into his mouth. Similarly, victim girl told her that since last two years, appellant-accused is having sexual intercourse with her on Saturdays and Sundays. When she asked them as to why they did not tell her earlier, her children told her that appellant-accused used to threaten them to kill them as well as her (informant). It is her further evidence that she informed the same to her mother and brother-in-law but they did not do anything in the matter. On the next day, she went to the police station and lodged the FIR. She then proved her FIR at Exh.21. According to her, police then referred the children for medical examination.

11 From the examination-in-chief of this witness, during the course of arguments, learned counsel tried to cull out some stray statements and attempted to persuade us that all is not well with the testimony of this witness. We have already pointed out the substantial portion from the substantive evidence of informant-mother. It appears that for the first time, on 23rd June 2013, she noted that victims were in a frightened state and therefore, she suspected something amiss and confronted victims but she did not get response as the appellant-accused was present in the house. Similarly, again on 26th June 2013, when the appellant-accused was absent, she took the victims into confidence and tried to ascertain as to what had gone wrong with them, but then again in the meanwhile appellant-accused came and therefore, the victims did not tell her anything. In our considered opinion, this is neither a serious omission nor embellishment, which should in any manner dent her testimony or the prosecution case. We are very much clear that her evidence is clearly in consonance with the contents of her FIR that on 28th June 2013, she again confronted the victims and then the victims

revealed a sordid affair at the hands of the appellant-accused regarding the manner of sexual exploitation at the hands of the appellant-accused. In such circumstances, and particularly the fact that nothing serious is forthcoming from the cross-examination of this witness, for all purposes, we are now concerned mainly with the testimony of the victims.

12 PW1 victim girl states in her evidence Exh.9 that on Saturdays and Sundays her father i.e. the appellant-accused used to leave house at 1.00 p.m. and used to come back at 9.00 p.m. At the relevant time, they were staying with the appellant-accused. For two years, on Saturdays and Sundays, her father used to touch her breast and used to insert his private part into her private part. He also used to keep his private part into her mouth and take her breasts into his mouth. After two days of starting of said things, her paternal aunt had been to her house and she had disclosed the said incident to her. According to the victim girl, the paternal aunt told her that since her father is doing a lot of things for them, she has to bear this. In June 2013, she

stated about the same to her mother. It is her further evidence that her father used to threaten her not to disclose said things, failing which, he would kill her mother and brother. For these reasons, she did not tell about these things to her mother. After disclosure of the incident to her mother, they started staying with her maternal grandmother. Police made enquiry with her. She was sent for medical examination.

13 From the evidence of this witness and as also that of informant-mother and which is not disputed, it is clear that the victims were having holidays on Saturdays and Sundays. The informant and the appellant-accused were also having holidays on Fridays. The appellant-accused used to leave house at 1.00 p.m. on Saturdays and Sundays. Therefore, one thing is clear that after the mother had left for her employment, the victims used to be in the custody of the appellant-accused-father. Certain portions from the cross-examination were pointed out during the course of argument by the learned counsel for the appellant-accused. This witness stated in her cross-examination that she never disclosed

about the said incident to her maternal uncle, maternal grandmother and teacher at any time. We do not find anything encouraging from this piece of evidence, in as much as, she has clearly stated in her evidence that she was threatened by the appellant-accused not to disclose the incident to anybody, otherwise he would kill her brother and mother. Moreover, the tender age of the victim girl must be kept in mind and her mental state because of the beastly behaviour perpetuated by none other than the appellant-accused-father.

14 Then there is omission in respect of her statement made on oath that the accused used to take her breasts into his mouth but as the same was not found in her statement recorded under Section 161 of the Cr.P.C., she was confronted with the same in the cross-examination but she insisted of having said so before the Investigating Officer. Although the Investigating Officer is examined by the prosecution, the defence counsel failed to get the said omission proved from his mouth. Even otherwise, we feel that this will not, in any manner, affect her otherwise truthful

testimony, as there is absolutely nothing in her remaining part of the cross-examination.

15 This brings us to PW2 victim boy. PW2 victim boy states in his evidence that there was no school on Saturdays and Sundays. The appellant-accused used to leave house at 12 noon on Saturdays and Sundays and come back by 9.00 p.m. On Saturdays and Sundays, when his mother used to go for work, his father used to wake them up and used to have anal sex with him. He also used to make him to take his private part into his mouth and this incident occurred with him since the time he was in sixth standard. He even disclosed about the said incident to his Badi Mummy (wife of his father's brother). He did not tell this to his mother because his father had threatened him to kill if he disclosed about it to anyone and he also threatened to kill his mother. In last week of June, on Friday, when his mother came home early and his father was not at home, he disclosed the incident to his mother. It is his further evidence that whenever he resisted the act of appellant-accused, the appellant-accused had

beaten him with belt and bat. According to him, he had stated all the facts to the police and he was referred for medical examination.

16 The learned counsel for the appellant-accused, during the course of arguments, constantly reminded us that none of the victims stated in their respective testimonies that they were ever in frightened state of mind, which is alleged by the informant-mother and also in the FIR, and therefore, an adverse inference must be drawn. In our view, it was the informant-mother's perception which she could rightly guess from the expression and behaviour of victims-children. Having regard to the age of victims, they were not expected to tell that they were always aghast and in a frightened state of mind. They were not able to reflect themselves because of the death threats given by the appellant-accused-father. Therefore, this is not something from which the defence could derive any kind of benefit to suit its end. The entire cross-examination of this witness like PW1 does not present anything which would, in any manner, question the prosecution

case. The defence has failed to elicit anything concrete from the mouth of this witness to its credit and therefore, the testimony of this witness stays.

17 The last important witness is PW4 Dr.Dipti Chandrakant Gaikwad. It is her evidence (Exh.24) that on 29th June 2013, Nalasopara police had referred two children viz., victim girl and victim boy for their medical examination. She examined both of them.

18 The Medical Officer's evidence shows that victim boy gave history of unnatural sexual assault regularly by step-father for last two years and last assault was on 23rd June 2013 i.e. five days before examination. He complained of P/R bleeding since five days. On local examination, she found blunt trauma with tenderness with blackish contusion injury, quadrangular 3 x 1.5 cm on left arm lateral. Second injury was anal fissure 1.5 x 5 cm. medially, 6 O'Clock position. Tenderness was present while P/R examination. On clinical examination, she opined that there was

evidence of sodomy and accordingly she issued certificate on 29th June 2013. She then proved the certificate at Exh.25. Lastly, she states that the injury on his left arm was about five days old.

19 Her evidence then shows that she examined the victim girl who had given history of sexual assault by step-father regularly for last two years and last assault was on 23rd June 2013 i.e. five days before examination. She had complained about vaginal tenderness and leucorrhoea. On local examination, she found following injuries :

- “1) Contusion on right thigh middle part laterally blackish in discoloration with tenderness measuring 6 x 4 cms.
- 2) Contusion injury on right thigh medially upper 1/4th of thigh blackish in discoloration, with tenderness, measuring 4.5 x 2 cms.
- 3) Contusion injury on left thigh medially upper 1/4th region blackish in discoloration with tenderness measuring 2.5 x 1 cms.
- 4) Hymen shows tear, 6 O’Clock position medially downward with distensible vagina admitting two fingers.

5) There was fungal infection on circumflexure region of thigh. Foul smelling vaginal discharge was present.

Clothes were changed, bath taken, motion stool passed. Samples were collected.”

20 From the examination of the patient, she was of the opinion that there was evidence of sexual assault. Accordingly, she prepared the certificate and issued. She then proved the Medical Certificate at Exh.26. According to her, the tear of hymen with distensible vagina shows repeated penetrative sexual assault. Similarly, presence of vaginal foul smelling and discharge was due to penetrative sexual assault. Except general denial, there is nothing in the cross-examination of this material witness.

21 From the Medico Legal Report and as also from the testimony of the Medical Officer, it is more than clear that there were ample proofs of sexual assault on the person of the victim boy and victim girl. Medical evidence, needless to say, lends credence to the fact that victims were regularly subjected to sexual assaults by the appellant-accused.

22 Having regard to the above discussion, we are of the firm view that there is copious evidence to show that the appellant-accused put the victims under threat and having put them under fear, he subjected them to unnatural and sexual intercourse on occasions more than one. What is appalling is that the appellant-accused, who is none other than the step-father though, perpetuated sexual assault under the death threats. Hapless subjugation to the lust of step-father was result of coercion and death threats.

23 Last aspect – delay in lodgement of FIR. Delay in lodging the FIR cannot be used as ritualistic formality for doubting the prosecution case and discarding the same, solely on the ground of delay in lodging the FIR. If the prosecution failed to satisfactorily explain the delay and there was a possibility of embellishment in prosecution version on account of such delay, the delay would be fatal to the prosecution. However, if the delay is properly explained to the satisfaction of the court, the delay

cannot by itself be a ground for disbelieving and discarding the entire prosecution case.

24 In the present case, the informant-mother states in her cross-examination that after hearing the incident from her children, she was shocked and did not lodge complaint on the same day with the police. On that day, her mother came to her house and at about 7.00 p.m. took her and her children with her. It is only on the next day i.e. on 29th June 2013, she went to Nalasopara Police Station and lodged the complaint. If the whole circumstances of the case is viewed in proper perspective, we find that the informant-mother sounds quite natural and although there is no delay, but even if it is so for the sake of argument, then the informant-mother has sufficiently and satisfactorily explained. It must be borne in mind that the complaint was to be lodged against her own husband and not against any third person. Having regard to the sequence of events, the conduct of the informant-mother was very much natural and therefore, we do not find merit in the contention that there was delay and again

assuming if it is to be so, then in that eventuality also, it does not cause any dent in the prosecution case.

25 It is clear that entire evidence led by the prosecution has been fully discussed and the learned trial Court has rightly come to the conclusion that the charges against the appellant-accused are fully made out beyond reasonable doubt and the appellant-accused has rightly been convicted and sentenced under the said counts by the learned trial Court. This court is, therefore, of the considered view that the appeal has no force and the judgment and order of conviction appealed against does not warrant any interference by this court.

26 For the reasons stated hereinabove, we pass the following order :

ORDER

Appeal is dismissed.

(V. G. BISHT, J.)

(PRASANNA B. VARALE, J.)