

Shailaja

## IN THE HIGH COURT OF JUDICATURE AT BOMBAY

## CRIMINAL APPELLATE JURISDICTION

## CRIMINAL APPEAL NO.13 Of 2017

|                                               |   |                       |
|-----------------------------------------------|---|-----------------------|
| Dhirendra alias Mohni alias Chhotu            | ] |                       |
| Gunanarayan Singh Chouhan                     | ] |                       |
| age 25 years, residence – Room                | ] |                       |
| of Prashant Jadhav, Near Laxmi                | ] |                       |
| Niwas Building, near Railway Station,         | ] |                       |
| New Indira Nagar, Kopri, Thane (E),           | ] |                       |
| Native Place – at and Post Nibhana,           | ] |                       |
| Post Niyabadpur, Taluka, Kalpi,               | ] |                       |
| Dist. Jalon, Uttar Pradesh,                   | ] |                       |
| (at present lodged in Central Prison, Thane.) | ] | Appellant/<br>Accused |

Versus

|                                           |   |            |
|-------------------------------------------|---|------------|
| The State of Maaharashtra                 | ] |            |
| (at the instance of Kopri Police Station, | ] |            |
| Vide C.R. No.1-39/2013)                   | ] | Respondent |

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Mr. Aashay Topiwala i/b Ms. Anajali Patil, for the Appellant.

Mr. A.A. Palkar, A.P.P for Respondent-State.....

CORAM: PRITHVIRAJ K. CHAVAN, J.

RESERVED ON: 20<sup>th</sup> FEBRUARY, 2020.

PRONOUNCED ON : 20TH MARCH, 2020.

**JUDGMENT:**

Challenge in this appeal is to a judgment and order of conviction passed by the Special Judge (POCSO Act) Thane in Special Case No.17 of 2013, by which the appellant has been convicted and sentenced as follows:

The appellant has been convicted under section 235 (2) of the Code of Criminal Procedure (for short 'Cr. P.C.') of the offence punishable under section 376 (2) (f) of the Indian Penal Code (for short 'I.P.C') and he has been sentenced to suffer Rigorous Imprisonment for 10 years with fine of Rs.5,000/-, in default, to suffer Simple Imprisonment for 6 months.

The appellant has been further convicted under section 235 (2) of the Cr. P.C of the offence punishable under section 366A of the I.P.C and he has been sentenced to suffer Rigorous Imprisonment for 5 years with fine of Rs.3,000/-, in default, to suffer the Simple Imprisonment for 3 months.

The appellant has been convicted under section 235 (2) of the Cr.P.C of the offence punishable under section 341 of the I.P.C and he has been sentenced to suffer Simple Imprisonment for 1 month with fine of Rs.500/-, in default, to suffer Simple Imprisonment for 7 days.

The appellant has been further convicted under section 235 (2) of the Cr. PC of the offence punishable under section 4 of the Protection of the Children from Sexual Offences Act, 2012 (for short 'POCSO Act') and he has been sentenced to suffer Rigorous Imprisonment for 10 years with fine of Rs.5000/-, in default, to suffer the Simple Imprisonment for 6 months.

2. The prosecution case in brief is as follows:

P.W.1 is the mother of the victim and the first informant who was, at the relevant time, residing at Subhash Nagar, Thane along with her minor son and two minor daughters. The victim was about three years at the relevant time. Her husband P.W.3 is a Small Scale Tradesman dealing in the business of *Jilebi* (sweets). P.W.4 also deals in sale of *Vadapav* (snacks) with whom the appellant was employed. Family of P.W.1 as well as the appellant are acquainted with each other, for, the appellant used to visit the house of the P.W.1. He was called as Chhotu.

3. It was 27<sup>th</sup> of March, 2013 which was a day of *Holi*. P.W.3 went to his work. P.W.1 and her daughter were at home. Around 11.00 a.m, the appellant came to their house for playing Holi. He had brought

some colours. After some time, he took the victim under the pretext of giving her chocolate. He took care of latching the door of P.W.1 from outside. Having noticed the same after some time, P.W.1 sought help of her son-P.W.7 by extending his hand from the window to open it. When P.W.1 searched for the victim, she could not find her. Around 1.35 p.m, P.W.1 was called at Kopari Police Station. P.W.3 was already present over there. The victim was crying and was without nicker. Blood was oozing from her private part. When asked, the victim informed that *Chhotu* Uncle had inserted his place of urination in her place of urination. That is how, it revealed that the appellant had sexually assaulted the victim.

4. A report came to be lodged vide C.R. No.I-39 of 2013 of the offence punishable under sections 341, 376 (2) (f) of the Indian Penal Code and under section 4 of the POCSO Act'. P.W.12-Abdul Mujad Tadví visited the scene of occurrence. He recorded spot panchanama **Exhibit 54**. A underwear of girl child, blood stained soil as well as sample soil at the scene of occurrence and 'T' shirt of the victim girl was seized under panchanama **Exhibit 33**.

5. The appellant was arrested on the same day. Clothes on his person with stains of blood were seized under Panchanama **Exhibit 42**. The

victim and the appellant were referred to for medical examination. The victim was admitted in the Hospital for three days. Rest of the investigation was carried out by P.W.13-Ashok Sapkal. After recording the statements and supplementary statements of the witnesses and having sent Muddemal for chemical analysis, the Investigating Officer has laid a charge-sheet in the Special Court POCSO, Thane.

6. A charge was framed in terms of **Exhibit 7** against the appellant under the relevant sections as referred above. He pleaded not guilty and claimed to be tried. His defence was that of denial of commission of offence alleged. Defence of the appellant as emerged from the line of cross-examination as well as his statement under section 313 of the Cr. P.C is denial of the commission of the offence alleged. It is specifically contended that from 11.30 a.m onwards on the day of Holi, he was in front of the house of one Geeta Thakur. However, no defence evidence has been adduced.

7. In order to substantiate the charge, the prosecution examined as many as 13 witnesses coupled with the documentary evidence in the form of medical certificates of the victim, the appellant, seizure panchanama of their clothes, sport panchanama and C.A report. The

learned Special Judge after going through the evidence of prosecution witnesses and having heard the respective sides, by the impugned order convicted and sentenced the appellant.

8. Heard the learned Counsel for the appellant and the learned A.P.P. With the assistance of learned Counsel for the appellant, I have meticulously gone through the testimonies of the prosecution witnesses as well as the documentary evidence. At the outset, the learned Counsel for the appellant contended that there are several contradictions and omissions on record *qua* P.W.1-first informant which have not been duly proved by P.W.13- Ashok Sapkal. It is contended that neither the blood group of the victim has been established nor identity of the appellant has been proved beyond doubt. It is contended that the identity of the appellant is doubtful in the sense that there is no statement of any independent witness recorded by the Investigating Officer. It being a Festival of Holi, several persons were present at the relevant time. The Investigating Officer could have recorded the statement of at least few of them. It is also contended that there is no DNA test conducted by the prosecution to ascertain the blood group of the victim.

9. The learned Counsel has emphasized on a fact that the prosecution has not examined the victim which goes to the root of the prosecution case as, it has come on record through testimony of PW.3 that the victim could speak well and, therefore, by not bringing her in the box, a reasonable doubt arose as to whether the victim was, in fact, ravished by the appellant. The learned Counsel further contends that the C.A report does not reveal marks of seminal fluid and the blood group of the appellant as per the said report is "O". Thus, according to the learned Counsel for the appellant, it is a case of acquittal.

10. Per contra, the learned A.PP strongly supported the impugned judgment by drawing my attention to the F.I.R which is prompt as well as to the statement of the appellant under section 313 of the Cr.PC from which it is apparent that the victim and the appellant were known to each other. It has been contended that since the victim was just three to four years old, the prosecution choose not to examine her as she could have been compelled to recall the horrifying incident. Evidence of PW.1- the first informant is clinching and cogent which remained un-rebutted. The learned A.PP strongly contended that the appellant had betrayed the trust by taking disadvantage of his acquaintance with the family of the victim. The act indicates the perverted mind of the appellant. Apart from that, my

attention has also been drawn to the Panchanama as well as testimonies of other witnesses including the fact that the so-called omissions and contradictions are insignificant. Thus, the learned A.PP contends that the appeal needs to be dismissed. Before that, the learned A.PP has drawn my attention to the reverse burden of proof upon the accused as per sections 29 and 30 of the POCSO Act which the appellant, has failed to rebut.

11. There is no much dispute as regards age of the victim who was about 3 to 4 years old as testified by her mother, P.W.1- the first informant and her father P.W.3 which finds materially corroborated by the testimony of the Medical Officer P.W.2-Dr. Sachin Rajput who had conducted radiological test for determining the age of the victim.

12. Testimony of the first informant-PW.1 reveals that on the day of the incident, at about 8.00 a.m the appellant came to their house and knocked the door. She asked the victim to open the door. The appellant alleged to have said that he wants to play Holi with P.W.1-the first informant. As husband of P.W.1 was not at home, she declined the offer of the appellant. The appellant went away only to return at about 11.00 a.m. The appellant asked the victim to accompany him for playing Holi and that he would give her a chocolate and also would bring *Samosas*. He

lifted the victim and took her away. The testimony of P.W.1 on this aspect finds support by the testimony of her another son P.W.7. Conduct of the appellant is borne out from the fact that while taking away the victim, he latched the door of the first informant from outside which itself indicates as to what was going on in his mind. Had it not been his intention to sexually assault the victim, there was no reason for him to latch the door from outside.

13. It was only at the Police Station where the first informant realized the fact that her daughter was taken away by Chhotu i.e the appellant to whom she (the victim) referred to as “*Samosa Uncle*”. It was informed by the victim that he took her near Khadi, removed her nicker and then slept over her. He did some act near her place of urination and moved up and down. Obviously, P.W.1-the first informant was shocked, horrified and speechless.

14. P.W.9-Sunil Rathi is an independent witness who supported the prosecution story to a considerable extent. According to him, on the day of Holi, he was sitting with his sister outside their house around 1 to 1.30 p.m. There is a tunnel at a short distance from his house which is visible from the house. Both he and his sister noticed a girl aged about three years

coming out from the tunnel and was crying. They did not pay much heed initially but when they noticed blood oozing from her private part, they inquired about her parents. By that time, two Policemen came over there and took the girl to Kopari Police Station in a Rickshaw. This witness who was present at the Police Station testified that when the girl was asked as to what had happened, she stated *Samosawala* Uncle which was obviously qua the appellant. There is no reason for this witness to depose falsely against the appellant as he had no axe to grind. Nothing has been elicited from his cross-examination which would render his testimony unworthy of credit. From the evidence of this witness, it is apparent that the appellant who was also known as *Samnosawala* Uncle apart from Chhotu Uncle was the real culprit. It is not the case of the appellant that other than him someone else was also known as by these two nicknames.

15. PW.3 testified that on the day of incident he was at his stall preparing *Jilebi*. When went to Mulund for delivering a parcel as per order of the customer, he received a phone call from PW.6 who informed him about the incident. PW.3 rushed to the Police Station. He noticed his daughter in a half naked condition at the Police Station who was crying and blood oozing from her private part.

16. PW.6 was also examined by the prosecution who supported the testimonies of other witnesses in material particulars. He has a grocery shop at Chendani, Kopari. PW.3 is his customer.

17. Spot panchanama-Exhibit 54 has been proved by P.W.12- Abdul Mujad Tadvi. Panchanama reveals blood spots at the scene of occurrence as well as a black coloured nicker with elastic.

18. Turning to the other important evidence of P.W.2-Dr. Sachin Rajput who had examined the victim. According to P.W.2-Dr. Rajput, there were two injuries namely;

- (I) bilateral clitoral fresh mucosal tear of size 2x1 c.m and;
- (ii) midline fresh vaginal mucosal tear involving the fourchette of size 1 c.m, the hymen was found torn and the tear was fresh.

Accordingly, he gave an opinion on the basis of examination of genitals of the girl that there was evidence of forceful sexual intercourse with the girl and accordingly a certificate was issued which is proved at Exhibit 25.

19. During cross P.W.2-Dr. Sachin Rajput denied the suggestion that the injuries could be possible by insertion of foreign body in the

vagina. However, it has been specifically testified by P.W.2-Dr. Sachin Rajput that he noticed fresh tear and thus there is no reason to disbelieve the testimony of an expert which finds full corroboration from the testimony of P.W.1 as well as what had been stated by the victim before her mother which is a relevant fact under section 6 of the Indian Evidence Act, 1872.

20. P.W.8-Bharat Thakre is a Panch witness in whose presence clothes of the appellant were seized. It was a pink coloured 'T' shirt with black strips and one blue coloured full pant and underwear. He testified that pant and T shirt were stained with blood from the front side. His testimony remained intact as the defence has failed to make any dent.

21. In the reports of the Chemical Analysis from the Forensic Science Laboratory at Exhibit 66, 66 (1), 66 (2) and 66 (3). Following observations are made;

*"The seized muddemal was forwarded to Forensic Science Laboratory (F.S.L.) for chemical analysis (C.A) with letter which is at Exhibit 59. The F.S.L report is placed on record which is at Exhibit 66, 66 (1), 66 (2) and 66 (3). Exhibit 66 eloquent that victim-girl's sleeveless T-shirt {exhibit 5 (e) has few bloodstains ranging from 0.5 c.m to 1.0 c.m in diametre*

*on front lower portion. Similarly, accused's half T-shirt {exhibit 6 (f)} has moderate bloodstains ranging from about 0.5 c.m to 1 c.m in diameter mostly on front lower portion were seen. So also, accused's full jeans pant {exhibit 7 (g)} has few bloodstains ranging from about 0.1 c.m to 0.5 c.m in diameter on upper middle portion of right leg were noticed. Even underwear (exhibit 8 (h)) is stained with blood at places. Species origin of Exhibit No.5, 6, 7 and 8 are Human of "A" blood grouping. F.S.L report at Exhibit-66 (1) evident that blood group of accused is "O". On victim girl's sleeveless T-Shirt {exhibit 5 (e)} blood group 'A' detected and so also on the clothes of accused {exhibit 6 (f), 7 (g) & 8 (h)} stains of blood group "A" are detected".*

22. The trial Court in paragraph 32 rightly observed as regards the report of the Chemical Analyst which reads thus;

*"Thus, this is the most strong piece of evidence to show that it was the accused who ravished the minor victim-girl and had bloodstains on his clothes and finding of bloodstains of blood group of victim-girl on clothes of accused corroborates the case of the prosecution".*

23. Thus, the reports of the chemical analyzer substantially corroborate the fact that it was none than the appellant who had committed forcible sexual penetrative intercourse with the victim.

24. As regards non examination of the victim girl, observations of the learned trial Judge are quite apt and perfect in the sense that when the victim was not in a position to depose properly as has been brought on record, it would be travesty of facts to insist upon her examination as a witness. Prosecution case, only on that count, cannot be thrown over board. The trial Court has, therefore, rightly placed a useful reliance on a judgment of the Supreme Court in the case of ***Mange V. State of Haryana reported in MANU/SC/0165/1979***. The ratio therein, as observed in the impugned judgment, squarely applies to the present set of facts. In the said case, the victim was a deaf and dumb girl aged about 13 years. The Supreme Court observed that apart from being a child witness she was deaf and dumb and therefore, no useful purpose would have been served by examining her as a witness.

25. In another case of ***Shilla @ Shilendrer v. State of Haryana, 1995 Cri. L.J. 3566***, it has been observed by the Hon'ble Supreme Court that mere fact that prosecutrix was not examined is not fatal to the

prosecution case and the conviction of appellant under section 376 (2) (f) was proper. The learned trial Judge has properly and correctly considered the social background of the victim's family vis-a-vis the mental trauma and agony suffered by them as well as the capacity of the witnesses to explain the incident in minute details. There are significant facts which need to be taken into consideration.

26. The learned trial Judge on the aspect of appreciation of testimony of a witness has quoted the observations made by Hon'ble Justice V.R. Krishna Iyer in the case of ***Inder Singh Vs. State (Delhi Administration) AIR 1978 SC 1091*** which are quite apt in the present set of circumstances which read thus:

*“Credibility of testimony, oral and circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. While it is necessary that proof beyond reasonable doubt should be adduced in all criminal cases, it is not necessary that it should be perfect. If a case is proved too perfectly, it is argued that it is artificial; if a case has some flaws, inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hyper sensitivity to eliminate a rare innocent from being punished, many guilty men must be callously allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish and guilty man cannot away with it because truth*

*suffers some infirmity when projected through human processes. Judicial quest for perfect proof often accounts for police presentation of fool-proof concoction. Why fake up? Because the Court asks for manufacture to make truth look true? No, we must be realistic”.*

27. As the prosecution has proved beyond all reasonable doubts the charge against the appellant, it was incumbent upon the appellant to discharge the onus to rebut the same as per section 29 of the POCSO Act, which contemplates that where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and 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.

28. The trial Court has thus properly and correctly appreciated the facts and evidence on record in the light of the provisions of the Evidence Act vis-a-vis under section 29 and 30 of the POCSO Act. The learned trial Judge has very meticulously considered each and every aspect and reached a proper conclusion which warrants no interference in the appeal. The appeal, therefore, stands dismissed.

[PRITHVIRAJ K. CHAVAN, J.]