

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CRIMINAL APPELLATE JURISDICTION****CRIMINAL APPEAL NO.1570 OF 2018**

Mohammad Hasumali Abdulali Ansari,

Age 35 years,

Occupation :- Labour,

Residing at Mantalwadi Fata,

Bhugaon, Tal. Mulshi,

District Pune

At present in Yervada Jail at Pune.

....Appellant.

Vs.

1 The State of Maharashtra,
Through Shivaji Nagar Police Station,
Pune.

2 Nam Lalit Vishwakarma,
Age 27, Shreeban Housing Society,
F.C. Road, Shivaji Nagar, Pune.

.....Respondents.

Mr. Avinash Fatangare i/by Vishakha Pandit for the Appellant.

Smt. Rutuja Ambekar, APP for the Respondent No.1.

None for the Respondent No.2.

CORAM : A. S. GADKARI, J.
DATE : 25TH NOVEMBER 2020.

JUDGMENT:-

The Appellant has impugned Judgment and Order dated 31st October, 2018 passed by the learned Additional Sessions Judge and Special Judge under the POCSO Act, Pune, convicting him under Section 376 (2)

(i) of the Indian Penal Code (for short, "*the IPC*") and under Section 3 punishable under Section 4 of the Protection of Children from Sexual Offences Act (for short, "*the POCSO Act*") and is sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.25,000/-, in default of payment of fine, to further suffer rigorous imprisonment for six months.

2 Heard Mr. Fatangare, learned counsel for the Appellant and Smt. Ambekar, learned APP for the State. Perused entire record.

3 The prosecutrix (P.W. No.5) was aged about 7 years on the date of commission of alleged offence i.e. 15th November, 2013 and with a view to protect her identity and in consonance with the provisions of Section 228(A) of the IPC and Section 33(7) of the POCSO Act, the names of material witnesses and detailed narration of facts mentioned in the statement of the prosecutrix and relevant witnesses is hereby avoided.

4 The prosecution case in brief is that:-

(i) The father (P.W. No.3) of the prosecutrix (P.W. No.5) was working as a labourer in Shriban Society, Pune. He was also doing odd works in the said Society. His wife (P.W. No.6) i.e. mother of the prosecutrix was assisting him in his work and was also doing other work outside. The said couple was having three children namely, the prosecutrix, a younger daughter who was aged about 3 years on the date of incident and a son by name Aayush. This family originally hails from Nepal

and was residing in the campus of the said Society.

(ii) It is the further prosecution case that, on 15th November, 2013 in the morning, the prosecutrix along with her younger sister and brother was playing in the compound of the building. The Appellant, who was working as a construction worker in the said building, came down and gave toffees to the said children. He thereafter took them along with him on the third floor of the said building. He took the prosecutrix in the toilet and removed her pant. The Appellant thereafter removed his pant and committed penetrative sexual assault on the prosecutrix. The prosecutrix started shouting and therefore, the Appellant wore his pant. The Appellant helped prosecutrix to wear her clothes and thereafter, he went away from the third floor of the said building. The younger sister of the prosecutrix saw the said incident.

(iii) The prosecutrix returned to her house and after her mother came back to home, she narrated the incident to her. The younger sister of prosecutrix also narrated the said fact to her mother. After coming to the knowledge about the said fact of molestation of his daughter, P.W. No.3 along with other residents of the building caught hold the Appellant and locked him in the bathroom of a flat situated on the third floor. The police were accordingly informed. The police came at the scene of offence and took prosecutrix and other persons to police station. The mother of prosecutrix (P.W. No.6) lodged FIR bearing No.199 of 2013 under

Section 376 of the IPC and under Section 3 read with Section 4 of the POCSO Act.

(iv) Initially investigation of the said crime was conducted by Police Inspector Mr. Pramod Waghmare (P.W. No.8) and it was subsequently transferred to Police Inspector Smt. Seema Mehandale (P.W. No.7). Dr. Reshma Waghmare (P.W. No.2) examined the prosecutrix and issued Medico Legal Certificate dated 16th November, 2013 (Exh-26). The police collected dust from the scene of offence by effecting panchanama (Exh-21) dated 16th November, 2013 in presence of panch witness Sudhakar Deshmukh (P.W. No.1). The police also seized clothes of prosecutrix by effecting panchanama (Exh-63) in presence of panch witness Chandrabahaddur Rokayya (P.W. No.9). On completion of investigation, police submitted charge-sheet before the Trial Court.

(v) The Trial Court framed charge below Exh-9 on 11th November, 2014 under Section 376 of the IPC and under Section 3 read with Section 4 of the POCSO Act. The said charge was read over and explained to the Appellant to which, he pleaded not guilty and claimed to be tried.

(vi) The prosecution in support of its case, examined in all 9 witnesses namely P.W. No.1-Sudhakar Deshmukh, a panch witness to Panchanamas at Exhs-20 and 21; P.W. No.2-Dr. Reshma Waghmare, Medical Officer who examined the prosecutrix; P.W.No.3-father of

prosecutrix; P.W. No.4-Smt. Vijaya Mahadik, a School Teacher; P.W. No.5-prosecutrix; P.W. No.6-mother of prosecutrix; P.W. No.7-Police Inspector Smt. Seema Mehandale, Investigating Officer; P.W. No.8- Police Inspector Mr. Pramod Waghmare, Investigating Officer and P.W. No.9-Chandrabahadur Rokayya, panch witness of seizure panchanama below Exh-63.

(vii) The Trial Court after recording evidence and hearing the learned counsel for the respective parties, has convicted the Appellant by its impugned Judgment and Order dated 31st October, 2018 as noted earlier.

5 Learned counsel for the Appellant submitted that, though the police have recorded statements of prosecutrix and her younger sister, a witness to the alleged assault under Section 164 of the Code of Criminal Procedure (for short, "*the Cr.P.C.*"), the younger sister has not been examined by the prosecution. He submitted that, except the version of prosecutrix, there is no other material on record to corroborate sexual assault on her. He submitted that, the evidence of Dr. Reshma Waghmare (P.W. No.2) does not disclose commission of actual penetrative sexual assault. Learned counsel for the Appellant by relying on head notes F and G and paragraph Nos.6 and 7 from the decision of *Aman Kumar & Anr. Vs. State of Haryana reported in (2004) 4 SCC 379*, coupled with the evidence of Dr. Reshma Waghmare (P.W. No.2) submitted that, in the present case in

hand it can at the most be termed as an attempt and the offence of rape is not completed.

He further submitted that, the statement of prosecutrix recorded under Section 161 was not annexed to the charge-sheet and therefore, the Trial Court had to pass an Order below Exh-1 dated 8th December 2017 thereby, directing the Investigating Officer to produce the same at the time of trial. He further submitted that, the mother of prosecutrix i.e. the first informant (P.W. No.6) was not knowing Marathi language and despite this, her FIR was recorded in Marathi. He submitted that, the said fact can be gathered from the opening paragraph of testimony of P.W. No.6, wherein the Trial Court had appointed an interpreter for her by passing an order below Exh-50. He submitted that, the FIR lodged by P.W. No.6 is therefore doubtful. He, therefore, prayed that the Appellant may be acquitted from the charges by allowing the present Appeal.

6 Per contra, learned APP opposed the Appeal and submitted that, the testimony of prosecutrix has been duly corroborated by Dr. Reshma Waghmare (P.W. No.2) who had examined her immediately after the alleged incident. She submitted that, as a matter of fact, in cross-examination vital admissions have been given by the said Doctor which are detrimental to the interest of the Appellant. She submitted that, the prosecution by leading cogent evidence has proved that, the Appellant is the sole perpetrator of the present crime. She therefore, prayed that, the

present Appeal may be dismissed.

7 Though the prosecution has examined 9 witnesses to substantiate its case, the evidence of P.W. Nos. 2, 3, 5 and 6 is important to decide the present Appeal.

P.W. No.3 i.e. the father of prosecutrix has deposed that, he hails from Nepal and was working in Shriban Society, Pune as a servant in the year 2013. He was residing in the campus of Society at Pune along with his family which consists of his wife (P.W. No.6), his daughter (P.W. No.5), younger daughter and a son. His wife was assisting him in his work and was also doing work outside. That, on 15th November, 2013, he had gone outside for work as usual and returned home at 5.00 p.m., when his wife P.W. No.6 informed him that, his daughter/prosecutrix (P.W. No.5) was called and taken in the office of Shri. Pawar by the Appellant by giving chocolate to her and the Appellant thereafter, committed unethical thing with her. He therefore, with the assistance of one person, caught hold the Appellant and locked him in bathroom. The incident was informed to the police on phone and thereafter police arrived at the scene of offence. They went to police station. The police recorded First Information Report as per the say of his wife. Police also recorded the statement of his daughter. Police sent his daughter (P.W. No.5) for medical examination to Sassoon Hospital, Pune. His daughter was admitted in hospital for 2 days. In his searching cross-examination, nothing beneficial to the Appellant has been

elicited.

8 The prosecutrix (P.W. No.5) in her testimony has stated that, on the day of incident, she was playing in the building along with her sister and brother. The Appellant came down from building and gave toffees. He thereafter took them on the 3rd floor of the said building. He brought them to a toilet block in a room. He initially removed her pant and thereafter his own. The Appellant pressed his private part on her private part. She started shouting and therefore, the Appellant worn his pant and helped the prosecutrix to wear her pant also. Her brother and sister were on 3rd floor. The Appellant thereafter went away on the 3rd floor of the said building. She returned to her place and narrated the incident to her mother. The Appellant was subsequently caught hold by the people and was confined in a toilet. After arrival of police, she was taken to hospital. The prosecutrix identified the Appellant in Court as the same person who committed the said act.

In her cross-examination also nothing beneficial to the Appellant has been elicited. The prosecutrix has denied all the suggestions given to her including the suggestion that, prior to the date of incident, there was a dispute between her parents and Appellant. The testimony of prosecutrix is unshaken in the cross-examination.

9 P.W. No.6 is the mother of the prosecutrix. She has duly corroborated version of P.W. Nos. 3 and 5. She has further deposed that,

on observation she noticed that, the private part of the prosecutrix had turned reddish. She has duly proved FIR (Exh-53). Nothing beneficial to the Appellant has been brought on record in the detailed cross-examination of this witness.

It is to be noted here that, the alleged contradictions which were pointed out by the learned counsel for the Appellant, are in fact minor omissions crept in the evidence of P.W. Nos.5 and 6, which do not go to the root of the matter.

10 Dr. Reshma Waghmare (P.W. No.2) had conducted medical examination of the prosecutrix. She has deposed that, she had obtained consent of the prosecutrix and her mother for medical examination. The mother of the prosecutrix narrated history of incident. In the clinical examination she noticed that, labia majora at lower end was mildly inflamed. On labia minora mild inflammation was present. Hymen was intact. Perihymenal inflammation was present. She therefore opined that, history and clinical findings were suggestive of possibility of attempted penetrative sexual vaginal intercourse with no evidence of any injuries over any other part of the body. She accordingly issued Medical Certificate at Exh-26.

In her cross-examination, the Appellant has brought on record certain admissions. This witness has admitted that, injury to labia majora, lower end mildly inflammation was not possible due to urinary infection. It

was possible that, injuries shown on Clause 10-(a) and (b) were due to unhygienic condition, but the age of the victim was 7 years and therefore, those were not possible due to unhygienic condition. This witness has categorically denied that, the victim was not sexually abused.

The evidence of other witnesses is corroborative in nature and is on the periphery of the matter.

11. Section 3 of the POCSO Act deals penetrative sexual assault. In Section 3(a) the words used are '*to any extent*'. Dr. Reshma Waghmare P.W.No.2 has clearly stated that, the clinical examination was suggestive of possibility attempted penetrative sexual vaginal intercourse and therefore is sufficient to attract Section 3 of the POCSO Act.

Admittedly, the age of the prosecutrix was 7 years on the date of alleged incident. The prosecutrix has in clear words narrated the ordeal which she had to suffer at the hands of the Appellant. Her version is duly corroborated by Dr. Reshma Waghmare (P.W. No.2). The prosecutrix and/or her family members did not have any enmity with the Appellant to falsely implicate him in the present crime. Perusal of testimony of prosecutrix clearly indicates that, it is wholly reliable and trustworthy. The prosecution has proved that, the appellant has committed an offence under Section 3 punishable under Section 4 of the POCSO Act.

12 Paragraph Nos.6 and 7 relied upon by the learned counsel for the Appellant in the case of *Aman Kumar (Supra)*, deals with the offence of

rape as contemplated under Sections 375 and 376-D of the IPC. The Hon'ble Supreme Court has enumerated difference between '*an attempt to commit an offence*' and '*actual commission of offence*' in context thereof, in the said two paragraphs.

13 It is to be noted here that, in paragraph No.5 of the said decision i.e. in the case of *Aman Kumar (Supra)*, the Supreme Court has held as under:-

"5. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. She stands on a higher pedestal than an injured witness. In the later case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice, would suffice."

The same view is further expressed by the Supreme Court in the case of *State of Himachal Pradesh Vs. Shree Kant Shekari*, reported in *AIR 2004 SC 4404*.

14 As far as the contention of the learned counsel for the Appellant that, though younger sister of the prosecutrix was a witness to the alleged incident and her statement under Section 164 of the Cr.P.C. was recorded, she was not examined by the prosecution is concerned, the same is recorded only for its rejection at its threshold. The expectation of the

Appellant that, the said child who was aged about 3 years and who had allegedly witnessed the said incident, ought to have been examined in the Court, would amounting to expecting too much from the prosecution and interalia from a child witness. It is however to be noted here that, in her statement recorded under Section 164 of the Cr.P.C. by the learned Judicial Magistrate, First Class, Pune, the said child witness has clearly stated that, the Appellant by luring her and prosecutrix took them up and committed 'dirty act' with the prosecutrix.

15 As far as the statement of prosecutrix recorded under Section 161 of the Cr.P.C. is concerned, as noted earlier, the same was produced by the prosecution in furtherance of Order dated 8th December, 2017 passed below Exh-1 by the Trial Court and the Appellant was granted complete opportunity to cross-examine the prosecutrix. No prejudice has been caused to the Appellant for not annexing the said statement to the charge-sheet by the police at the inception. The Trial Court has taken all necessary precautions and care in protecting interest of the appellant in that behalf.

Perusal of first information report lodged by P.W. No.6 would clearly indicate that, after it was jotted down, the contents of the same were explained to her in Hindi language in presence of a woman Police Sub-Inspector and thereafter she had signed it. The contention of the learned counsel for the Appellant that, P.W. No.6 was not knowing Marathi

language has been accordingly taken care of.

16 In view of the above discussion, this Court is of the opinion that, the Trial Court has not committed any error either in law or on facts, while convicting and sentencing the Appellant for the charges levelled against him.

Appeal being dehors of merits and is accordingly dismissed.

(A.S. GADKARI, J.)